Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,
Petitioners,

v.

BALDWIN HARDWARE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether sanctions entered against an attorney during the course of a trial may be affirmed, despite a *prima facie* showing of extra-judicial bias and prejudice on the part of the trial judge who imposed the sanctions, without at least reviewing the complete record, including the trial transcript, and a full airing of important arguments raise on appeal?

2. Whether sanctions entered against an attorney may be affirmed without consideration of whether appropriate procedural safeguards were employed, especially where a trial judge has acted as witness, prosecutor and judge?

3. Whether sanctions entered against an attorney may be affirmed without an express reference to the authority on which the sanctions are based?

4. Whether sanctions entered against an attorney pursuant to a court's inherent power or 28 U.S.C. § 1927 may be affirmed without an express finding of bad faith?

LIST OF PARTIES

Pursuant to S.Ct. Rule 29.6, the following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioner:

1. KLAYMAN & ASSOCIATES, P.C.

   A. Parent Corporation: None

   B. Subsidiaries: None

2. LARRY KLAYMAN

Respondent:

1. BALDWIN HARDWARE CORPORATION

   A. Parent Corporation: Masco Corporation

   B. Subsidiaries: None.

   C. Affiliates: FM Holdings, Inc.
   Galveston Houston Company
   Masco Tech, Inc.
   TriMas Corporation
   Payless Cashways, Inc.

Defendants:

1. FRANKSU ENTERPRISE CORPORATION

   A. Parent Corporation: None

   B. Subsidiaries: None

2. FRANK SU

3. DECORATORS ACCESSORIES, LTD.

   A. Parent Corporation: None

   B. Subsidiaries: None

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OPINIONS BELOW

The March 4, 1996 opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") that gives rise to this petition is published at 78 F.3d 550. It is also reprinted in Appendix A hereto at App. 1-27. By an Order dated May 22, 1996, the Federal Circuit partially granted a petition for rehearing, making limited changes to the language of part of its March 4, 1996 opinion. This Order is reprinted in Appendix B at App. 28-29. Otherwise, the petition for rehearing was denied, as was the suggestion for rehearing *en banc*. The May 22, 1996 Order by which the Federal Circuit modified its March 4, 1996 opinion is reprinted in Appendix C at App. 30-32.

STATEMENT OF JURISDICTION

Petitioners, Klayman & Associates, P.C. and Larry Klayman, were counsel to defendants Franksu Enterprise Corporation, Frank Su and Decorators Accessories, Ltd. in the District Court action, which was brought pursuant to that court's federal question, patent and trademark jurisdiction, 28 U.S.C. § 1331, 1338 and 15 U.S.C. § 1121. Final Judgment was entered on December 14, 1992.

As the District Court action included claims for patent infringement, the appeal was heard by the Federal Circuit pursuant to 28 U.S.C. § 1292(c)(2) and 28 U.S.C. § 1295(a)(1). The Federal Circuit affirmed on March 4, 1996. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 22, 1996.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is timely if filed within ninety (90) days of May 22, 1996, or by August 20, 1996.

RULES INVOLVED

Canon 2(A) of the Code of Conduct for United States Judges ("Judicial Code of Conduct") provides:

> A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(A)(2) of the Judicial Code of Conduct provides:

> (2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

Canon 3(A)(3) of the Judicial Code of Conduct provides:

> (3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

Canon 3(A)(4) of the Judicial Code of Conduct provides:

> (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full

> right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

Canon 3(B)(3) of the Judicial Code of Conduct provides:

> (3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Canon 3(C)(1)(a) (c) and (d) of the Judicial Code of Conduct provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> > (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > (c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing

> in the judge's household, has a financial interest in the subject mater in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship or the spouse of such a person: (i) is a party to the proceeding or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3(C)(2) of the Judicial Code of Conduct provides:

> (2) A judge should keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

Canon 3(C)(4) of the Judicial Code of Conduct provides:

> (4) Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or has a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that

> could be substantially affected by the outcome), disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Canon 2(A) of the American Bar Association Model Code of Judicial Conduct ("ABA Model Code") provides:

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(B)(4) of the ABA Model Code provides:

> (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Canon 3(B)(5) of the ABA Model Code provides:

> (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.

Canon 3(D)(1) of the ABA Model Code provides:

> (1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises substantial questions as to the other judge's fitness for office shall inform the appropriate authority.

Canon 3(E)(1) (a) (c) and (d) of the ABA Model Code provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) a judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > (c) the judge knows that he or she, individually or as a fiduciary, the judge or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject mater in controversy or in a party to the proceeding or has any other more than de minimis interest that could be affected substantially by the outcome of the proceeding.

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3(E)(2) of the of the ABA Model Code provides:

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

Canon 3(F) of the of the ABA Model Code provides:

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate , the judge may participate in the proceeding. This agreement shall be incorporated in the record of the proceeding.

28 U.S.C. § 455(a) ("the statute") provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality night reasonably be questioned.

§ 455(b)(1) of the statute provides:

> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

§ 455(f) of the statute provides:

> (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially effected by the outcome), disqualification is not required if the justices, judges, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

This petition raises issues vital to the administration of our legal system, as it concerns not only the conduct of attorneys who practice before the courts, but also the conduct of the judges who preside over them, and the thoroughness and fairness with which questions about attorney and judicial conduct are reviewed on appeal.

Specifically, at issue is an amount in excess of $20,000 in monetary sanctions imposed on Petitioners by the District Court and the permanent revocation or disbarment of Petitioner Klayman's *pro hac vice* rights. These sanctions were affirmed by the Federal Circuit despite serious issues concerning the impartiality of the trial judge who imposed them, including the appearance of extra-judicial bias and prejudice against Petitioners, their clients, and various witnesses, all of whom were of either Jewish or Asian descent, as well as a potential financial conflict of interest.

Importantly, at oral argument, the panel of Federal Circuit judges presiding over this appeal ("the Panel") expressly stated that, due to the nature of the issues before it, a review

of the full trial transcript was absolutely necessary to render a fair opinion.[1] Nonetheless, it affirmed the District Court's sanctions without availing itself of the opportunity to do so.

The Federal Circuit also affirmed the District Court's sanctions despite acknowledging at oral argument that the Judicial Code of Conduct is more stringent than statutory provisions requiring disqualification. While Petitioners had relied on the Judicial Code of Conduct in support of their arguments that the trial judge's orders must not be given any force or effect due to the appearance of extra-judicial bias and prejudice and a financial conflict of interest, the Federal Circuit failed to address it in its decision. Likewise, the Federal Circuit ignored case law demonstrating that even the appearance of a conflict of interest or bias is sufficient to warrant disqualification.

Moreover, the Federal Circuit affirmed these sanctions despite Petitioner Klayman not having been accorded full due process rights before being effectively "disbarred" by the trial judge, including but not limited to adequate notice of the charges against him, the right to counsel, and a full evidentiary hearing before an impartial trier of fact.

Finally, in affirming these sanctions, the Federal Circuit employed standards that are in direct conflict with well-

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[1] Petitioners' efforts to secure a complete and fair review of the District Court's orders were continually frustrated by their inability to obtain a complete copy of the trial transcript, which, at that time, they could not afford, as it was estimated to cost in excess of $9,000.

established case law requiring an express recitation of the legal authority on which sanctions are based, as well as specific findings of bad faith where sanctions are imposed pursuant to a court's inherent powers or 28 U.S.C. § 1927.

Petitioners recognize that it may be difficult for any court to confront issues of judicial bias and prejudice. No one likes these kinds of cases. While it may have been difficult for the Federal Circuit, a highly-specialized "patent tribunal," to address emotionally-charged issues of judicial bias and prejudice, it is doubly hard for Petitioners to bring further attention to charges that have severely harmed their reputations and livelihoods by pursuing appellate remedies.[2]

However, appellate courts must be diligent in carrying out their oversight function if the attorney litigants who appear before them are to be afforded due process of law -- even in cases that raise issues that may be difficult to address. The Federal Circuit expressly declared the need to review the complete trial transcript, but failed in its admitted responsibility to do so. It also failed to address crucial arguments concerning the law to be applied in determining whether the trial judge should have been disqualified and the procedural safeguards to which Petitioners were entitled before the sanctions at issue could be imposed.

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[2] Adversaries of Petitioners have consistently cited the District Court's sanctions orders and the Federal Circuit's decision for tactical advantage in litigation, and some competitor law firms have even provided it to prospective clients to convince them not to hire Klayman & Associates, P.C. and Larry Klayman, Esq., but to hire their firm instead.

By perfunctorily affirming the District Court's sanctions in this manner, the Federal Circuit failed to address the serious issues about attorney and judicial conduct raised by Petitioners in their appeal. The resulting decision not only effectively denied Petitioners due process of law, but creates a dangerous precedent for the imposition of severe attorney sanctions that is directly at odds with the decisions of other Circuit Courts of Appeal ("the Circuits") in several substantial ways. Thus, a writ of *certiorari* is necessary so that this Court may exercise its supervisory power and resolve the conflicts among the Circuits created by this opinion. Only in this way can petitioners' important due process rights and the integrity of our judicial system be preserved.

Accordingly, this is a case of great precedential importance to the fair administration of professional standards of conduct for both attorneys and judges. Such fair administration is necessary not only to protect zealous advocacy by trial counsel (*see Model Code of Professional Responsibility*, Canon 7 (1979)), but also to preserve the confidence that the public at large must, by necessity, place in the American judicial system.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI IS PROPER BECAUSE THE FEDERAL CIRCUIT'S AFFIRMANCE OF THESE SANCTIONS EFFECTIVELY DENIED PETITIONERS THEIR DUE PROCESS RIGHTS AND NECESSITATES AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. Affirmance Without Review of the Trial Transcript.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court recognized the important, due process right to have an appeal adjudicated on a full trial record. As importantly, at oral argument, the panel of Federal Circuit judges reviewing this appeal acknowledged the need to review the trial transcript:

> [By the Court] "...the burden [of obtaining the complete trial transcript] is on this court now because [Baldwin] and Mr. [K]layman have both raised to us that the conduct before the trial judge of the lawyers is relevant to some resolution of a dispute between you. We need to know what the conduct was from the beginning to the end. Ordinarily we are only interested in the parts of the transcript that relate to a particular issue on appeal....But what you are two are both arguing about is the conduct over time of both parties, attorneys...So you can't be selective and just give us the things you want us to see. We have to see, or I assume we have to know what the conduct over time was of all of the lawyers, unfortunately we have to know that, if we're going to resolve the issues you all have proposed."

Appendix D at App.47 (Emphasis added).[3]

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[3] This acknowledgment was obviously based on the rules regarding "supplementation of the record" (*see Salinger v. Random House, Inc.*, 818 F.2d 252, 253 (2d Cir. 1987); Fed.R.App.P. 10, and the "doctrine of completeness" (*see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988); *U.S. v. Burreson*, 643 F.2d 1344, 1349 (9th Cir. 1981), among others. *See also Williams v. St. Louis County*, 812 F.2d 1079, 1082-83 (8th Cir. 1987).

The Panel also confirmed that it would obtain the complete transcript through routine court procedures:

> "We have a procedure that we can request it and it's sent here within days. Our clerk does this routinely. I've done it on many occasions...."

Appendix D at App. 49.

Despite having expressly acknowledged the absolute need to review the entire trial transcript, and despite precedent from this Court emphasizing the importance of reviewing a trial transcript on appeal, *see Griffin*, *supra*, the Federal Circuit failed to review anything more than a few, distorted excerpts that Appellee had "cropped" from the trial transcript.[4] Moreover, the Federal Circuit also declined an offer by Appellee to provide seventy-five percent (75%) of the

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[4] Petitioner Klayman had initially attempted to obtain the transcript *in forma pauperis* and, to that end, submitted all necessary financial information. However, the Federal Circuit apparently lost this material, then denied the request on the basis that no supporting financial data had been submitted. Appendix A at App. 15. When Petitioners raised this issue in their petition for rehearing and suggestion for rehearing *en banc*, the Federal Circuit apparently admitted its mistake and revised the language of its opinion, but nonetheless denied the request without any underlying analysis. *See* Appendix C at App. 31. The Federal Circuit's treatment of Petitioner Klayman's *in forma pauperis* request regrettably demonstrates the reticent manner in which it shied away from addressing the core issues of the appeal over a period of nearly three and a half years.

transcript (*see* Appendix D at App. 47), and an offer by Petitioners to obtain the remainder.[5] Importantly, had the Federal Circuit availed itself of this opportunity, it would have found numerous instances of conduct -- including the trial judge's references to Petitioner Klayman as "Mr. Schmuckler," and references to Petitioners' client as "the artful Taiwanese dodger," among many others -- that created an appearance of religious and nationality-based extra-judicial bias and prejudice, thus requiring the trial judge's disqualification under 28 U.S.C. § 455(a), (b)(1) and/or Canon 3(C) of the Judicial Code of Conduct.[6] *See* Sworn Witness

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[5] In the three and a half years that passed between its filing and the final disposition of the appeal, Petitioners financial situation improved to enable it to make this offer.

[6] Importantly, this is not the first time that an appellate court has been asked to review, and has sought to correct, manifestations of extra-judicial bias and prejudice by this trial judge. In *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989), the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") found that remarks by the trial judge about the national origin of a Colombian defendant, among other factors, warranted reversal of a sentence. In that case, the trial judge had made an improper reference to "Mr. Borrero's ilk," as well as his lack of English language capability. *See Borrero-Isaza*, 887 F.2d at 1354. In this case, the same trial judge made derogatory references to Mr. Richard Carter, who is Jewish, as "Mr. Carter and his ilk," among other seemingly biased remarks and conduct. *See* App. at 55.

In *U.S. v. Hobbs*, 991 F.2d 569, 571, 574 (9th Cir. 1993), the Ninth Circuit found that the trial judge's characterization of a juror, whom he derisively described, without cause, as a

Affidavits at Appendices E and F, which were part of the record before the Federal Circuit. *See* Federal Circuit Docket Entry No. 31 at Exhibits 1 and 2.

By affirming the Districts Court's sanctions without reviewing the complete trial transcript, after acknowledging that a review of the complete transcript was necessary in order to render a fair decision on the appeal, the Federal Circuit denied Petitioners due process of law. In light of this *prima facie* denial of due process, an exercise of this Court's supervisory powers is necessary to ensure that all of the Circuits, not just this particular court, are diligent in carrying out their oversight functions so as to not only protect attorney rights, but also to preserve the integrity of and the public's confidence in the judicial system as a whole.

B. Affirmance Without Reference to Judicial Canons.

Canon 3 of the Judicial Code of Conduct for United States Judges provides:

> (3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Judicial Code of Conduct, Canon 3(B)(3).[7]

"non-conformist," was inappropriate.

[7] Likewise, Canon 3 of the ABA Model Code states: "A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this code should take appropriate action. A judge having

Other portions of the Judicial Code of Conduct address such important issues as judicial impartiality and courtroom decorum. Specifically, Canon 2(A) of the Judicial Code of Conduct provides:

> A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3(A)(2) of the Judicial Code of Conduct provides:

> A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

Canon 3(A)(3) of the Judicial Code of Conduct provides:

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knowledge that another judge has committed a violation of this Code that raises substantial questions as to the other judge's fitness for office shall inform the appropriate authority." ABA Model Code, Canon 3(D)(1).

Moreover, the ABA Model Code makes clear that such conduct can be based upon courtroom behavior: "A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expressions and body language, in addition to oral communications, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial." Commentary to ABA Model Code, Canon 3(B)(5) (Emphasis added).

> A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

Canon 3(A)(4) of the Judicial Code of Conduct provides:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law....

See also ABA Model Code, Canon 2(A) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); ABA Model Code, Canon 3(B)(4) ("A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."); ABA Model Code, Canon 3(B)(5) ("A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.").

In addition, at oral argument the Panel itself referenced the Judicial Code of Conduct and acknowledged that its

provisions are more stringent than the requirements of 28 U.S.C. § 455 governing disqualification. *See* Appendix D at App. 52. Case law cited by Petitioners also confirmed that even an appearance of bias or financial conflict of interest is sufficient to warrant disqualification under 28 U.S.C. §455. *U.S. v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996) ("Under § 455(a) disqualification is required [and may be ordered by an appellate court] if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown."); *Moody v. Simmons*, 858 F.2d 137, 142-43 (3d Cir. 1988); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

In their appeal, Petitioners made a *prima facie* showing of extra-judicial bias and prejudice on the part of the trial judge, or, at a minimum, an appearance of extra-judicial bias and prejudice, based on the following:

1. remarks made by the trial judge about the ethnic and/or religious background of Petitioner Klayman, Defendants' principals and Defendants' key witness; *see* Appendices E and F;

2. a history of similar conduct by the trial judge in previous cases; *see Borrero-Isaza*, *supra*; *Hobbs*, *supra*; and

3. the trial judge's financial interest in Appellee's parent corporation. *See* Appendix A at App. 7-8.

In light of this uncontroverted showing, it was incumbent upon the Federal Circuit to take appropriate action, including a review of the entire transcript, to pursue this matter to a just

and fair conclusion. Judicial Code of Conduct, Canon 3(B)(3); *see also* ABA Model Code, Canon 3(D)(1). However, the Federal Circuit not only failed to do so, but it also failed to perform any analysis under the Judicial Code of Conduct (or the ABA Model Code) whatsoever -- despite the Panel's having acknowledged at oral argument that the Judicial Code of Conduct is more strenuous than the statutory provisions of 28 U.S.C. § 455; Appendix D at App. 52. Importantly, the Federal Circuit even failed to address "black letter" case law demonstrating that only the appearance of impartiality was necessary for a trial judge to be disqualified under 28 U.S.C. § 455. *Tucker*, 78 F.3d at 1324; *Moody*, 858 F.2d at 142-43; *Potashnick*, 609 F.2d at 1111.

However uncomfortable these issues might have been for fellow judges to confront, due process, the Judicial Code of Conduct, the statute and relevant case law requires not a perfunctory affirmance, but a thorough review of the complete trial transcript and supporting evidence, along with consideration of all relevant legal arguments. The Federal Circuit's failure to perform this analysis raises serious concerns about due process and the administration of the court system, particularly when judicial conduct is at issue. Thus, *certiorari* is, respectfully, necessary to enable this Court to exercise its supervisory powers over the Federal Circuit to preserve the fair administration of justice.

C. Affirmance Without Consideration of the Necessity for Procedural Safeguards.

Before sanctions may be imposed, procedural safeguards must be employed to protect the due process rights of counsel under threat of sanctions -- especially where a judge has

become personally embroiled with counsel during the course of a trial. For example, *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986), a case involving the same lower court judge, the Ninth Circuit held:

> If...the record reflects that the judge imposing the sanction has been the target of the sanctioned attorney's vilification or was otherwise personally embroiled with the attorney during the trial, the suspicion is intensified and the court must carefully assess the circumstances to determine if additional due process safeguards are called into play.

796 F.2d at 1181.[8] In the specific context of *pro hac vice* admissions, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") has cautioned:

> "If a District Court has evidence of behavior that it believes justifies denying an attorney admission *pro hac vice*, it must set a hearing date and give the attorney adequate notice of all incidents of alleged misbehavior or unethical behavior that will be charged against him. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. The presiding judge must be sensitive to possible conflicts of interest if events cast him into the roles of witness, prosecutor and judge."

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[8] *See generally Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), also concerning this same trial judge.

In re Evans, 524 F.2d 1004, 1008 (5th Cir. 1975) (Emphasis added). Similarly, in *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350 (3d Cir. 1990), the U.S. Court of Appeals for the Third ("Third Circuit") stated:

> [W]e think a district court...must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution required further proceedings, including the need for an evidentiary hearing.

899 F.2d at 1359 (Emphasis added).

Because the trial judge's *pro hac vice* order effectively barred Petitioner Klayman from ever appearing before the District Court again, Petitioners correctly argued that he was entitled to a full panoply of procedural safeguards, including ample notice, the right to counsel, and an evidentiary hearing before an impartial judge, among others. *See, e.g.*, Appendix D at App. 36-37. However, the trial judge, with whom Petitioner Klayman had clashed repeatedly during the course of a trial that lasted several weeks, took it upon himself to be "witness, prosecutor and judge" by orally "springing" a sanction order on Petitioner Klayman, *sua sponte*, after issuing his findings on the merits of the case. Thus, Petitioner Klayman was denied the right to meaningful notice of the factual and legal bases of the serious charges against him, the opportunity to research and reflect on these serious charges, the right to counsel, the right to an evidentiary hearing, and the right to an impartial trier of fact.

However, as with Petitioners' arguments concerning the applicability of the Judicial Code of Conduct, the Federal Circuit did not address this very important legal issue in its

decision. Thus, not only were Petitioners denied due process of law in the District Court, but they were also denied due process of law by the Federal Circuit, which failed to fully perform its oversight function by not addressing the important issues before it and by rendering an opinion without having reviewed the entire trial transcript, despite uncategorically admitting that a review of the entire transcript was necessary. Thus, a writ of *certiorari* is required to enable this Court to exercise supervisory powers to ensure that, not just this particular appellate court, but all of the Circuits, are constantly diligent in carrying out their duties, and that all attorney litigants who come before them be afforded full due process of law, and that charges of judicial misconduct are thoroughly and seriously reviewed. In this case, while reflexively criticizing Petitioners for raising issues of extra-judicial bias, the Federal Circuit inexplicably shied away from reviewing the trial transcript to properly consider this bias on appeal. Accordingly, its decision was reached in a self-imposed "factual vacuum."

II. A WRIT OF CERTIORARI IS NECESSARY BECAUSE THE FEDERAL CIRCUIT'S AFFIRMANCE OF THESE SANCTIONS, WITHOUT THE TRIAL COURT'S EXPRESS IDENTIFICATION OF THE SANCTIONING AUTHORITY OR AN EXPRESS FINDING OF BAD FAITH, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

A. The Affirmance of Sanctions Without Reference to the Sanctioning Authority.

In affirming the District Court's *pro hac vice* order, the Federal Circuit issued a decision that is in direct conflict with the decisions of at least three (3) other Circuits. Specifically, because the lower court's *pro hac vice* order was silent as to the authority under which it was entered, the Federal Circuit speculated that the District Court had acted pursuant to its inherent powers: "It may be that Judge Keller intended his further citation to his 'discretion' to mean his inherent powers to impose sanctions when appropriate." *See* Appendix A at App. 21. The Federal Circuit then proceeded to analyze the District Court's *pro hac vice* order as if it had been entered pursuant to its inherent powers.

In contrast to the Federal Circuit's speculation in affirming the District Court's *pro hac vice* order, the U.S. Court of Appeals for the First Circuit ("First Circuit") and the Third Circuit vacated and remanded sanctions orders for failure to specify the legal bases for their imposition. For example, in *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139 (1st Cir. 1991), the First Circuit held: "[A]t a bare minimum, the trial court must indicate, either expressly or by unmistakable implication, which source of authority it is invoking..." *Id.* at 142. Likewise, in *Jones*, *supra*, the Third Circuit vacated and remanded a sanctions order for this same reason:

> "[W]e think a district court in the exercise of its sound discretion must identify and determine the legal basis for each sanction charge sought to be imposed, and whether its resolution required further proceedings, including the need for an evidentiary hearing....The resulting findings must appear with reasonable specificity in terms of the perceived misconduct and the sanctioning authority"

Jones, 899 F.2d at 1359.

Similarly, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") vacated and remanded a trial court's award of attorneys fees that failed to specify whether the award had been entered pursuant to Fed.R.Civ.P. 11 or 28 U.S.C. § 1927. *U.S. v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1346 (2d Cir. 1991) ("It is clear therefore, that separate consideration of the available sanctions machinery is not only warranted, but necessary for meaningful review."); *see also In re Yagman*, 796 F.2d at 1183 ("This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon.")

The holdings of the First, Second and Third Circuits present the better reasoned approach. Specifying the legal basis for the imposition of sanctions is not only necessary for meaningful appellate review, *see Int'l Bhd of Teamsters*, 948 F.2d at 1346, but must be required to ensure that the party upon which the sanctions were imposed had adequate notice of the legal basis for the charges against it. Specificity is also necessary to avoid the chilling effect that would likely result from such orders, as surely attorneys will be less likely to represent their clients zealously if they can be sanctioned without reference to any particular legal authority. *In re Yagman*, 796 F.2d at 1183. Thus, a petition for writ of *certiorari* is necessary to settle the conflict created by the Federal Circuit's decision on this important issue of law.

B. The Affirmance of Sanctions Issued Pursuant to a Trial Court's Inherent Authority Without a Finding of Bad Faith.

This Court has cautioned that, because of the "very potency" of a court's inherent power, it should be exercised "with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Thus, several of the Circuits require a highly particularized showing of bad faith before they will affirm sanctions entered pursuant to a trial court's inherent authority.

For example, in *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit') held:

> Because "inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." To insure that restraint is properly exercised, we have routinely insisted upon a finding of bad faith before sanctions may be imposed under the court's inherent powers. A specific finding of bad faith by the trial judge or magistrate must accompany the sanction order in all such cases.

885 F.2d at 1478, *quoting*, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (Citations omitted).

Likewise, in addressing the use of a court's inherent powers to impose sanctions, the Second Circuit stated in *Int'l Bhd of Teamsters*:

> We have declined to uphold awards under the bad faith exception absent both "'clear evidence' that the challenged actions 'are entirely without color, and [are taken] for reasons of harassment or delay or for other improper

purposes'" and "'a high degree of specificity in the factual findings of [the] lower courts.'"

948 F.2d at 1345, *quoting*, *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

In this case, after first speculating that the District Court had relied on its inherent power in imposing the *pro hac vice* sanction, the Federal Circuit then affirmed the order by inferring a finding of bad faith: "Although the words 'bad faith' are not recited in the order, the order makes clear that the trial judge considered Mr. Klayman to have acted in bad faith..." Appendix A at App. 22. Resorting to such an inference, rather than requiring a specific finding of bad faith, is thus in direct conflict with the decisions of the Ninth and Second Circuits, which require highly particularized findings of bad faith before affirming a sanction order entered pursuant to a trial court's inherent authority.

In light of this Court's own admonitions on the need for courts to use restraint and discretion in exercising their inherent powers, *Chambers*, 501 U.S. at 44; *Roadway Express*, 447 U.S. at 764, the better reasoned approach is that of the Ninth and Second Circuits, as only with a particularized finding of bad faith can a reviewing court ensure that proper restraint has been used in the exercise of a court's inherent authority. Thus, a writ of *certiorari* is necessary to resolve the conflict among the Circuits created by the Federal Circuit's opinion on this important issue of law.

C. Affirmance of Sanctions Issued Pursuant to 28 U.S.C. § 1927 Without a Finding of Bad Faith.

Finally, the Federal Circuit's decision is also in conflict with decisions of the Second and Third Circuits insofar as it affirmed an award of sanctions imposed pursuant to 28 U.S.C. § 1927 by applying a lesser, "objective" standard of recklessness, rather than a stricter, "subjective" standard of bad faith. Moreover, the Federal Circuit affirmed this award despite the District Court's failure to make even an express finding of recklessness. Specifically, the Federal Circuit stated:

> "In this case, although Judge Keller did not employ the words 'bad faith,' our review of the record leaves no doubt that he considered K&A's conduct with regard to the proceedings for which sanctions were imposed to be at least reckless."

Appendix A at App. 20 (Emphasis added).

This holding is in direct conflict with authority from the Second Circuit, demonstrated by that court's decision in *Int'l Bhd. of Teamsters*, requiring an express finding of bad faith to impose sanctions pursuant to 28 U.S.C. § 1927. Specifically, in *Int'l Bhd. Of Teamsters*, the Second Circuit declared: "Bad faith is the touchstone of an award under this statute," 948 F.2d at 1345, and "[b]oth §1927 and the court's inherent power demand, *inter alia*, a clear demonstration of bad faith in order to justify sanctions." 948 F.2d at 1347.

Likewise, the Third Circuit also has adopted this stricter standard. "Section 1927 requires a finding of counsel's bad faith as a precondition for the imposition of fees." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987); *see also Martin v. Brown*, 63 F.3d 1252, 1264 (3d Cir. 1995) ("We

note, however, that section 1927, unlike Rule 11, requires bad faith").

The holdings from the Second and Third Circuits present the better reasoned approach because, as with the need for a District Court to specify the legal authority under which sanctions are imposed, a subjective standard of bad faith avoids any chilling effect on vigorous advocacy that might otherwise occur. Attorneys will be less likely to represent their clients to the fullest extent if, in retrospect, zealous, but good faith conduct may later be characterized by a skillful opponent or court as sanctionable, reckless conduct. This is especially true in a legal environment in which litigants increasingly attempt to use sanctions to secure tactical advantages. Thus, a writ of *certiorari* is necessary to settle the conflict among the Circuits on this important issue of law as well.

CONCLUSION

Petitioners are mindful that, in order to preserve the integrity of and confidence in the judicial system, attorney sanctions must be meted out in appropriate circumstances. However, to avoid a chilling effect on zealous advocacy (*see Model Code of Professional Responsibility*, Canon 7), due process requires that adequate procedural safeguards be employed to determine when sanctions are appropriate and to ensure that they are imposed fairly when those circumstances arise, especially where a trial judge has acted as witness, prosecutor and judge. To this end, an impartial court imposing the sanctions must, at a minimum, specify the legal basis for its action and make appropriate factual findings, including an express finding of bad faith, when sanctions are

to be imposed pursuant to a court's inherent power or 28 U.S.C. § 1927. Moreover, due process requires that attorney litigants upon whom sanctions are imposed must be afforded meaningful appellate review -- not blind, perfunctory affirmances -- even when they raise difficult and uncomfortable issues concerning the professional conduct of fellow judges. Because the sanctions in this particular case were imposed, and upheld, without due process and appropriate procedural safeguards, the petition for writ of *certiorari* should, respectfully, be granted to avoid creating a dangerous precedent that would chill zealous advocacy by trial counsel on behalf of their clients. This is required to preserve the integrity of and confidence in the legal system, for not only attorneys and judges, but also the public at large, as:

> Justice should not only be done, but should manifestly be seen to be done."

Lord Hewart, *King's Bench Reports*, Vol. 1 (1924) (Emphasis added).

Respectfully submitted,

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APPENDIX A - MARCH 4, 1996 APPELLATE COURT OPINION

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

DECIDED: March 4, 1996

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

PLAGER, Circuit Judge.

Klayman & Associates, P.C., a law firm ("K&A"), challenges sanctions imposed on the firm by the trial court for failure to comply with local rules and for "unreasonably and

vexatiously multiplying the proceedings," during K&A's defense in design patent and trademark infringement litigation brought by Baldwin Hardware Corporation ("Baldwin") against FrankSu Enterprise Corporation, Mr. Frank Su, and Decorator Accessories Ltd. ("Decorax"), Larry Klayman, K&A's lead counsel in this litigation, appeals from the trial court's order permanently prohibiting Mr. Klayman from appearing *pro hac vice* before the trial judge, William D. Keller, in any future litigation. K&A and Mr. Klayman (collectively "Appellants") argue that the orders are invalid because the trial judge failed to recuse himself from the case despite a financial conflict of interest and apparent bias against appellants and their clients; and that in any event, counsel's conduct did not merit sanctions. Baldwin, which secured a finding of willful infringement below, cross-appeals, seeking full attorney fees for that action and costs and attorney fees for this appeal, which it contends is frivolous.[1] After careful consideration of the record and materials submitted by the parties, we affirm the trial court's award of monetary sanctions against appellants, deny further attorney fees to Baldwin, and award Baldwin costs for this appeal. We also affirm Judge Keller's order permanently prohibiting Mr. Klayman from appearing before him *pro hac vice* in the future.

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[1] FrankSu Enterprise Corporation, Frank Su and Decorax also appealed initially. This court dismissed that appeal on November 12, 1993, however, because they had released K&A as their counsel and did not acquire new counsel or, in the case of Mr. Frank Su, apply to appeal *pro se*. See Fed. Cir. R. 47.3(a).

BACKGROUND

This regrettable appeal has its origins in design patent and trademark infringement litigation brought by Baldwin, an American manufacturer of bathroom and door hardware, against FrankSu Enterprise Corporation, a Taiwanese competitor, along with Mr. Frank Su, Franksu's owner and Decorators Accessories, Ltd., a Franksu distributor. Judge William D. Keller of the Central District of California presided over a seven-week trial and the motions practice preceding trial.

Pretrial proceedings, particularly discovery proceedings, in this matter were marked by appellants' delays in complying, or failure to comply, with the court's rules and orders. On December 9, 1991, Judge Keller assessed against K&A attorney fees and costs incurred by Baldwin in responding to appellants' *ex parte* application for an extension of time to oppose Baldwin's summary judgment motion, and for a continuance of the hearing date on the motion. Judge Keller found that K&A filed its application for an extension three days after the opposition due date, and that the only proffered reasons for lateness, extensive business travel and the errors of an associate at the firm, were insufficient.

Early in the trial, conducted in 1992, reference was made to Baldwin's parent company, Masco. The next day Judge Keller informed the parties that at the time Baldwin filed its complaint in September 1990, the judge's mother had owned shares in Masco as part of a trust fund naming Judge Keller as the beneficiary. The trust sold the shares in November 1990, before the judge had become involved in any way in the case. Because the shares had been sold well before Judge Keller became involved in the case or knew that Masco was related

to one of the parties before him, and given the amount of time he had spent on the case to date, the judge concluded that he was not required to recuse himself. Both parties expressly agreed with this conclusion.

During the course of the trial, however, appellants requested that Judge Keller recuse himself under 28 U.S.C. § 455 (1994).[2] Appellants cited the following grounds for the motion: (1) that Judge Keller had "prejudged" the case; and (2) that Judge Keller "at some point in [the] case" had a prospective financial interest in Baldwin's parent company, Masco. Judge Keller denied the motion after addressing each of the instances of alleged prejudgement raised by appellants. He also addressed the Masco issue for a second time and concluded that the circumstances did not warrant recusal.

Over the course of the trial, Judge Keller admonished Mr. Klayman several times concerning his conduct of the proceedings: for example, failing to provide advanced written notice of the prior art appellants intended to use during trial, as required by 35 U.S.C. § 282; failing to have Mr. Frank Su appear in court on the appointed day after the trial court had granted an extension of time to allow for Mr. Su's travel from Taiwan and preparation by counsel; and lodging a late request for a jury trial on the patent issues in the case after admittedly waiving a jury trial for such issues at a pretrial status conference. Additionally, Judge Keller expressed increasing frustration with Mr. Klayman's practice of continuing to speak after the trial judge requested silence.

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[2] Unless otherwise indicated, all citations are to the 1994 edition of the United States Code.

Following the close of trial, Judge Keller *sue sponte* ordered Mr. Klayman permanently and prospectively barred from appearing before Judge Keller *pro hac vice* in any future litigation. Judge Keller cited several actions by Mr. Klayman during the trial as grounds for the order. Additionally, Judge Keller sanctioned K&A under 28 U.S.C. § 1927 for "unreasonably and vexatiously multiplying the proceedings" and awarded Baldwin attorney fees and expenses incurred with respect to various aspects of the trial. Judge Keller incorporated the sanctions orders into his final judgment in the case.

Appellants appeal the monetary sanctions and *pro hac vice* order. Baldwin cross-appeals for full attorney fees and costs incurred in the proceedings below and in this appeal.

DISCUSSION

We have jurisdiction over this matter under 28 U.S.C. § 1295(a)(1), which provides for exclusive Federal Circuit jurisdiction over "an appeal from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title [providing district courts original exclusive jurisdiction in patent cases, and original jurisdiction in trademark cases]".

I

Appellants argue first that the sanctions orders and the *pro hac vice* order are invalid because they were entered by a judge who was required to recuse himself under 28 U.S.C. § 455, which provides in pertinent part:

> (a) Any . . . . judge . . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party . . . . (4) He knows that he, individually or as a fiduciary . . . . has a financial interest in the subject matter in controversy or in a party to the proceeding . . . .

28 U.S.C. § 455(a), (b)(1), (b)(4). Specifically, appellants argue that Judge Keller was required to recuse himself under § 455(a) and (b)(1) because his comments and conduct during the litigation would have led a reasonable person to believe he harbored anti-Asian and anti-semitic sentiments, and therefore to doubt his impartiality.[3] Appellants also argue that the prior ownership of Masco shares by Judge Keller's mother's trust created a financial conflict of interest requiring recusal under § 455(b)(4). Because Judge Keller did not recuse himself, appellants contend, any subsequent orders issued by him, including the sanctions orders and the judgment against appellants' clients, are invalid.

In reviewing Judge Keller's denial of recusal, which raises substantive and procedural issues not within our exclusive jurisdiction, we are guided by the law of the regional circuit. See *Refac Int'l, Ltd. v. Hitachi Ltd.*, 921 F.2d 1247, 1253-54, 16 USPQ2d 1347,1352 (Fed. Cir.1990) (sanctions under Rule 37 and Rule 11 reviewed under Ninth Circuit law); *Atasi*

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[3] Clients Frank Su and Franksu Enterprise Corp. are Taiwanese. The president of Decorax, a key defense witness, is Jewish, as is Mr. Klayman.

Corp. v. Seagate Technology, 847 F.2d 826, 829, 6 USPQ2d 1955, 1956 (Fed. Cir. 1988) (disqualification of law firm reviewed under regional law). Under Ninth Circuit law, the standard for review of Judge Keller's refusal to recuse himself is abuse of discretion. *United States v. Chischilly*, 30 F.3d 1144, 1149-50 (9th Cir. 1994).

A. Recusal for financial conflict of interest

We first address this matter of financial conflict of interest. We agree with Baldwin that appellants' assertion of a financial conflict of interest in this matter borders on the frivolous. Appellants' brief utterly omits any discussion of the key facts and key legal provision concerning this issue. The record establishes that Judge Keller's mother owned a trust which invested in several stocks, among them shares of Masco, the parent company of Baldwin. Judge Keller was the named beneficiary of the trust and thus owned a remainderman interest in the shares. The trust sold the shares in November 1990, two months after Baldwin filed its patent action. Judge Keller did not issue his first substantive order in this case until the end of December 1990. He did not learn of the relationship between Masco and Baldwin until after trial had begun, roughly eighteen months later. When he did, he disclosed to the parties his former remainderman interest in Masco shares, expressed his opinion that the trust's divestiture of the shares well before he became substantively involved in the case or knew of the Masco-Baldwin relationship eliminated any need for recusal, and invited the parties to raise any conflict of interest concerns with him at that point. Notably, Mr. Klayman stated that he did not "wish to make a point of it." Regardless of whether, as Mr. Klayman later pointed out to Judge Keller, § 455(e) prevents waiver by a

party of financial conflicts, Mr. Klayman's statement indicates that he initially did not consider recusal to be required.

Under these facts, Judge Keller clearly was not required to recuse himself. Section 455(f), also omitted from appellants' brief, provides:

> Notwithstanding the preceding provisions of this section, if any . . . judge . . . to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge . . . divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455(f). This provision squarely fits the present circumstances. It suggests, in fact, that even if the Masco shares had remained in the trust until Judge Keller discovered the Masco-Baldwin relationship, divestiture by the trust at that point (or relinquishment by Judge Keller of his remainderman interest in those shares) would have avoided the need for disqualification. Appellants' utter failure to address this provision, or the relevant facts on this issue, is inexplicable. In any event, assuming that the trust's ownership of the Masco shares raised a financial conflict under § 455(b), the November 1990 divestiture of those shares eliminated any such conflict and any possible need for recusal on that basis.

B. Recusal for alleged antisemitism and anti-Asian bias

We turn next to appellants' claim that Judge Keller exhibited antisemitism and anti-Asian bias against appellants and their clients, and therefore was required to recuse himself under §§ 455(a) and (b)(1). "Sections 455(a) and (b)(1) are to be construed together when the ground for recusal is the bias or partiality of the trial judge." *United States v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980) (citing *United States v. Olander*, 584 F.2d 876, 882 (9th Cir.1978)). Under those provisions, "the trial judge is required to recuse himself only when a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *Winston*, 613 F.2d at 223.

This determination, in the first instance, "rests within the sound discretion of the [trial] judge." *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir.1980) (citation omitted). Appellants never directly presented the issue of ethnic or racial bias to Judge Keller as a ground for recusing himself, nor did they afford Judge Keller an opportunity to address this issue.[4] Under the circumstances, we question whether the matter is

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[4] There was one indirect reference to ethnic bias in a comment that Mr. Klayman made to Judge Keller in listing the grounds for his recusal motion. Mr. Klayman asserted that Judge Keller "raised the issue that you treat everybody the same regardless of national origin. Your Honor, that was a non sequitur in that context." Mr. Klayman's other assertions of bias with respect to the way Judge Keller evaluated the credibility of witnesses or criticized appellants' performance contained no direct reference to ethnic or religious bias on the part of Judge Keller.

properly before us on appeal, and "even assuming that [appellants] may raise [a] section 455 recusal claim for the first time on appeal . . . we would review the district court's failure to recuse himself under the plain error standard." *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991). In the interest of ensuring that justice not only is impartial but appears so, we have reviewed the record to determine in the first instance whether it would have constituted plain error for Judge Keller to have refused recusal under § 455(a) and (b)(1).

The Supreme Court recently elaborated on the type of judicial conduct, and the underlying reasons for that conduct, that warrant recusal for bias:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile, to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge . . . . Not establishing bias or partiality . . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune.

Liteky v. United States, 114 S. Ct.1147,1157 (1994). We have thoroughly reviewed the record before us and devoted much consideration and reflection to the parties' contentions. We conclude that appellants have not carried the heavy burden necessary to substantiate their recusal claim under *Liteky*. While Judge Keller was stern (with counsel for both sides, not just appellants) and imposed less restraint on his comments and criticism than may be desired, we cannot say that his conduct of the proceedings evinced a "deep-seated favoritism or antagonism [toward Asians or Jews] that would make fair judgment impossible." *Liteky*, 114 S. Ct. at 1157. Our overall impression from the record and pleadings in this appeal is that Judge Keller grew increasingly impatient with what he considered to be incompetence or lack of forthrightness and that he conducts his courtroom with strict enforcement of the rules.

To warrant recusal, bias or prejudice must be directed against a party and bias exhibited against an attorney will only merit recusal when it results in material and identifiable harm to that party's case. See *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985); *Cintron v. Union Pacific R.R.*, 813 F.2d 917, 921 (9th Cir. 1987). In this case, the record indicates that Judge Keller did not permit his frustration with appellants to interfere with a full trial of their clients' claims and defenses. For example, although sanctioning counsel for delaying the trial in part due to Mr. Frank Su's nonappearance on the scheduled date, the trial judge allowed appellants additional time to prepare Mr. Su and permitted the parties to rearrange the order of witnesses to ensure sufficient preparation time. Moreover, while sanctioning appellants for failing to comply with § 282, Judge Keller nonetheless allowed in much of the prior art of which appellants had failed to notify Baldwin.

The trial judge ruled partly in favor of appellants' clients. He found that some of FrankSu's products did not misappropriate Baldwin's trade dress rights, and that some Baldwin products had no protectable trade dress rights. Further, although the trial judge found that FrankSu willfully infringed and misappropriated Baldwin's trade dress, he doubled rather than trebled damages. The trial judge did not award full attorney fees to Baldwin, and stayed execution of the attorney fee sanctions against appellants pending appellate review. Baldwin asserts, and appellants do not dispute, that the trial judge withdrew documents relating to settlement negotiations from evidence in which Mr. Frank Su admitted copying and infringement of Baldwin's designs, despite appellants' failure to object to them. In these circumstances, we find no material and identifiable harm to appellants' clients from any reprimand of appellants by the trial judge.

It should be noted, moreover, that appellants rejected an opportunity to have a magistrate judge rather than Judge Keller try the case below. This opportunity came during appellants' belated request for a jury trial on Baldwin's patent claims, which appellants claim they made after they purportedly recognized Judge Keller's alleged bias against appellants and their clients. During the colloquy between appellants and the trial judge concerning the jury trial request, appellants stated that they wanted Judge Keller to preside rather than a magistrate because they "liked" him and felt he had "a good sense of humor. That's important." Despite the trial court's urging, appellants refused to accept a magistrate to preside over the trial. In these circumstances, it ill becomes appellants to assert that Judge Keller's later refusal to recuse himself nullifies all proceedings below.

Appellants have moved us to order a complete trial transcript, which they contend is needed to fully inform this court of the bias that allegedly infected the proceedings below. Although ordinarily it is appellants' responsibility to obtain those portions of the record it requires to support its case, Fed. Cir. R. 10(a)(1), (2), (4), appellants assert that financial distress, occasioned in part by the monetary sanctions and FrankSu's failure to pay appellants' fees, prevents them from purchasing the transcript.[5] Appellants previously applied to the district court, either on their clients' behalf or their own, four times for a reduced transcript fee. The district court denied these requests, finding that the corporate entities were not eligible to proceed *in forma pauperis* under *Rowland v. California Men's Colony*, 113 S. Ct. 716, 719 (1993), and that neither appellants nor their clients had provided sufficient objective evidence of distress to establish "exceptional circumstances" warranting in forma pauperis treatment under 28 U.S.C. § 1915.[6]

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[5] The district court has informed this court that there is no transcription of the trial tapes at the district court; therefore appellants would be required to purchase a copy from the court reporter, as did Baldwin. Despite this court's urging, the parties did not reach a cost-sharing arrangement regarding those portions of the trial transcript in Baldwin's possession.

[6] See *Weller v. Dickinson*, 314 F.2d 598, 600 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963). The district court also found that corporations FrankSu and Decorax were not qualified to proceed *in forma pauperis* under 28 U.S.C. § 1915. *Rowland v. California Men's Colony*, 113 S. Ct. 716, 719 (1993).

Rather than directly appeal the district court's rulings, appellants instead applied to this court to "compel access to" the transcript and to include it in the Appendix on appeal. After this court twice instructed appellants that "this court will not become involved in the matter of the cost of the transcript of district court proceedings," a motions panel denied appellants' application for access, commenting that the merits panel may revisit the issue. Appellants filed a pending "Renewed Motion for Access to the Trial Transcript and to Supplement the Record to the Merits Panel," purportedly pursuant to this statement.

As the trial judge stated in his orders denying appellants relief on this issue, appellants may seek payment of transcript fees by the United States only when specifically authorized by statute. The statutory authority for such relief is 28 U.S.C. § 1915 ("Proceedings in forma pauperis"), which gives the federal courts discretion to direct payment by the United States of the expenses of printing the record on appeal, if such printing is required by the appellate court. See 28 U.S.C. § 1915(b).[7] Under *Rowland*, K&A, a professional corporation,

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[7] Contrary to appellants' assertion in an earlier version of their "Motion for Access," Federal Circuit Rule 11 (a) does not authorize this court to order transcription of the trial tapes at the expense of the federal government when Appellants have made no showing that they are entitled to such relief under 28 U.S.C. § 1915. Rule 11 (a) only authorizes the court to order transmission of the existing record; in this case, no record in the form of a complete trial transcript exists to be transmitted. Federal Rule of Appellate Procedure 10(e) is similarly unavailing. We note that appellants did not attempt to avail themselves of Federal Rule of Appellate Procedure 10(c), which allows a party, when a transcript is unavailable,

clearly is not entitled to proceed *in forma pauperis*. Individuals such as Mr. Klayman must substantiate their claims of financial distress to obtain *in forma pauperis* treatment. Mr. Klayman has not done so. As with his previous motions before the district court and this court, his latest submission provides no objective supporting data to support their claims of financial distress or justify this court's taxing the Federal Government with the considerable estimated bill for a complete transcript.[8] A previous "Motion for Access" cites to "[f]inancial information filed under seal" that supports his claims, yet he made no effort to place this information before this court, under seal or otherwise. Also in support of the financial distress claim, the motion appends an exhibit that consists of a blank page with the bracketed statement, "[Contains financial information which has been deleted]." It need hardly be said that this is insufficient. Accordingly, we deny appellants' Renewed Motion for Access to the Transcript.

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to "prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Fed. R. App. P. 10(c). The statement must be served on the appellee, who may object, and the statement and any objections are submitted to the district court for settlement and approval and inclusion in the record on appeal. *Id.*

[8] Baldwin offered to provide the court with a copy of the portion of the transcript they obtained below, which comprises roughly 60 percent of proceedings. In light of appellants' contention in prior motions that review of the entire transcript is necessary to adequately evaluate their claims, and that use of only Baldwin's submissions is inadequate, we decline Baldwin's offer.

In the absence of a complete trial transcript, appellants have sought to build their bias case largely on sources entirely unrelated to the proceedings below -- in particular, Judge Keller's involvement in the sanctioning of Steven Yagman, a Jewish attorney in California, and the local bar's general assessment of Judge Keller's skill and competence on the bench. Such sources are not relevant to the issue of whether Judge Keller exhibited bias or prejudice against appellants' clients warranting recusal in this case.[9]

Appellants also have appended to their pending motion for access to the transcript the affidavits of Messrs. Richard Carter and Steven Goldstein, who served as witnesses during the trial (Mr. Carter also was President of Decorax, which as noted was a defendant below). The affidavits were executed roughly two years after trial and assert, often in generalized terms, that Judge Keller exhibited bias and behaved improperly throughout the trial. Although Baldwin urges us to reject these affidavits, this court already accepted them as attachments to appellants' August 8, 1994 Response to Baldwin's Motion for Leave to File a Supplement to its Initial Brief. Our review of them in the context of deciding the transcript and bias issues indicates no basis for concluding differently than indicated above.

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[9] If anything, the bar evaluations provided by Appellant suggest that the sanctions in this case may have resulted from Judge Keller's practice of strict enforcement of local rules, not ethnic bias against these particular appellants or their clients. *E.g.*, Almanac of the Federal Judiciary, Vol. 1 (1991-1), at 48 (quoting attorney's comment that one should "[f]ollow local rules precisely or be sanctioned. ").

C. Abuse of discretion -- Sanctions

We next turn to appellants' challenges to the monetary and *pro hac vice* sanctions imposed upon them, reviewing each of the three orders in turn. As with recusal, the imposition of monetary and *pro hac vice* sanctions in this case raises issues not within our exclusive jurisdiction. We therefore are guided by the law of the Ninth Circuit.

1. December 9, 1991 Order

Judge Keller found that K&A had failed to comply with Local Rule 27.1 in filing an *ex parte* application for an extension of time to oppose Baldwin's summary judgment motion, three days after the opposition deadline had run. Judge Keller granted an extension to K&A, but assessed against K&A attorney fees and costs incurred by Baldwin in responding to the *ex parte* application. As noted above, Judge Keller stayed execution of the fee award pending review by this court.

Local Rule 27.1 provides that "[t]he violation of or failure to conform to any of these Local Rules . . . shall subject the offending party or counsel to such penalties, including monetary sanctions and/or the imposition of costs and attorney's fees to opposing counsel, as the Court may deem appropriate under the circumstances. " C. D. Cal. Local R. 27.1. K&A does not dispute that it missed the filing deadline for its opposition, or that it filed the application for extension three days after the filing deadline expired. Nor does it mention that it sought an additional 28 days, rather than the usual 14, and asked, without offering any justification, that Baldwin's reply period be shortened from 7 days to 3. K&A attributes the untimeliness to the error of an associate in the

firm, and argues that because it did not act in bad faith, the trial court erred in imposing sanctions.

The decision to impose sanctions under Local Rule 27.1 is reviewed for abuse of discretion; underlying fact findings are reviewed for clear error. Attorneys fees may only be assessed for a violation of Local Rule 27.1 when the attorney acts in bad faith or willfully disobeys court orders or rules. *Zambrano v. Tafolla*, 885 F.2d 1473 (9th Cir. 1989) (mere negligence in failing to become admitted to bar of federal district court did not support attorney fees award). In *Zambrano*, the court stated that "lawyers who willfully, repeatedly, or recklessly disregard court rules or orders may be sanctioned." Id. at 1485.

Judge Keller's order finds that appellants' only excuse for missing the filing deadline was that they were involved in extensive business travel. The order clearly demonstrates that Judge Keller considered appellants to have acted recklessly in disregarding or not paying closer attention to the filing deadlines imposed by the court's rules. We note that Judge Keller did grant appellants 13 extra days in which to file their opposition to Baldwin's summary judgment motion, thereby avoiding any prejudice to their clients from appellants' delay. Under these circumstances, Judge Keller did not err or abuse his discretion in issuing the December 9, 1991 sanctions order. We also reject appellants' request that we remand for recalculation of the amount of the sanctions, finding no error in the trial court's acceptance of the 7.75 hours of preparation time submitted by Baldwin.

2. August 25, 1992 Order

Judge Keller also assessed against K&A, under 28 U.S.C. § 1927, Baldwin's fees and costs incurred with respect to (1) a one-day delay in commencement of trial caused by appellants; (2) Baldwin's opposing Mr. Frank Su's unsuccessful motion to dismiss based on lack of personal jurisdiction; (3) Baldwin's Motion in Limine to exclude prior art for which K&A had not provided notice as required under 35 U.S.C. § 282; (4) trial time spent on addressing the Sepco exhibits, which appellants attempted to introduce as "later discovered" prior art despite contradictory testimony from appellants' own witness; and (5) Baldwin's Motion for Sanctions under § 1927. Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

K&A argues that Judge Keller abused his discretion by imposing these sanctions without finding subjective bad faith on the part of K&A. K&A also argues that fees for a section 1927 application are not themselves available under that provision.

We review all aspects of a sanctions award under section 1927 for abuse of discretion. *MGIC Indemnity Corp. v. Moore*, 952 F.2d 1120, 1121-22 (9th Cir. 1991). Although a finding of bad faith is required to impose sanctions under § 1927, "[k]nowing or reckless conduct meets this standard," and the lack of an explicit finding of bad faith by the trial judge will not preclude sanctions when the record supports such a finding. *Id.* at 1122 (citations omitted); see also *Kanarek v. Hatch*, 827 F.2d 1389,1391 (9th Cir.1987); *Toombs v. Leone*,

777 F.2d 465, 471 (9th Cir. 1985); *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1048, 1051 (9th Cir. 1985).

In this case, although Judge Keller did not employ the words "bad faith," our review of the record leaves no doubt that he considered K&A's conduct with regard to the proceedings for which sanctions were imposed to be at least reckless. We have carefully considered appellants' arguments to the contrary, but conclude that the record supports Judge Keller's assessment of appellants' conduct. Accordingly, we find that he did not err or abuse his discretion in awarding sanctions against appellants. In addition, we reject appellants' contention, included in certain "transcript access" motions filed with this court but not advanced in their brief on appeal, that appellants were not given adequate opportunity to address the issues identified in the sanctions order; the record indicates that these issues were fully aired below.

We also reject appellants' argument that "fees for fees" are not available under section 1927. We have found no authority for such a proposition, and appellants cite none. The statute allows recovery of excess fees incurred as a result of opposing counsel's conduct, and "fees for fees" clearly fall within this description.

3. June 30, 1992 Pro Hac Vice Order

At the close of trial, Judge Keller *sue sponte* indicated that he intended to issue an order permanently and prospectively barring Mr. Klayman from appearing before him *pro hac vice* and requiring him to attach a copy of the order to any future *pro hac vice* applications in the Central District of California. Judge Keller cited the conduct that he felt

supported this sanction and allowed Mr. Klayman to respond and to explain or address the conduct cited. After listening to Mr. Klayman's response and following the close of trial, Judge Keller issued the above described order.

Mr. Klayman contends, first, that this order has no basis in law. "For a sanction to be validly imposed, the conduct in question must in fact be sanctionable under the authority relied upon." *In re Yagman*, 796 F.2d 1165, 1182-83 (9th Cir. 1986). In issuing the above order Judge Keller cited the *pro hac vice* rules, which gives the trial judge discretion to grant or deny *pro hac vice* status. Central District of California Local Rule 2.2.3.1 provides:

> 2.2.3.1 Permission Pro Hac Vice. Any person who is not otherwise eligible for admission to practice before this Court, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court, or of the highest court of any State, Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear before this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate pro hac vice in a particular case.

(emphasis added).

It is not clear that this rule authorizes Judge Keller's order; the rule appears to address determinations of admission *pro hac vice* in each individual case. It may be that Judge Keller intended his further citation to his "discretion" to mean his inherent powers to impose sanctions when appropriate. "Any court which has the power to admit attorneys to practice may

also sanction them for unprofessional conduct." *Standing Committee on Discipline v. Ross*, 735 F.2d 1168,1170 (9th Cir.1984); see also *Yagman v. Republic Insurance Co.*, 987 F.2d 622, 628 (9th Cir. 1993). That power encompasses the authority to suspend an attorney admitted *pro hac vice* from further practice before the court. *United States v. Engstrom*, 16 F.3d 1006 (9th Cir. 1994) (upholding order suspending attorney admitted *pro hac vice* from practice before the court for three years).

We review the terms of a disciplinary order entered under the court's inherent authority for abuse of discretion. *Engstrom*, 16 F.2d at 1011; *Yagman*, 987 F.2d at 628. A court imposing sanctions under its inherent powers must determine that the attorney acted in bad faith. *Yagman*, 987 F.2d at 628. Mr. Klayman contends that Judge Keller abused his discretion by permanently denying *pro hac vice* status without finding that Mr. Klayman acted unethically or in bad faith. Although the words "bad faith" are not recited in the order, the order makes clear that the trial judge considered Mr. Klayman to have acted in bad faith, in particular by making certain misrepresentations to the court. For example, Judge Keller found that Mr. Klayman represented to the court that he had never been sanctioned or denied *pro hac vice* privileges, when in fact his former firm, Klayman & Gurley, P.C., had been sanctioned in a matter handled by Mr. Klayman and two other attorneys of the firm. Mr. Klayman's explanation of his failure to mention the prior sanctions to Judge Keller -- that he did not understand the judge's question to cover those sanctions since they were imposed on the firm and not him personally -- is unconvincing. That the order was being appealed at the time of Judge Keller's inquiry, or that the order was subsequently vacated at the request of both parties in order to further settlement of the dispute, is irrelevant.

We have carefully considered appellants' explanations for the other misconduct cited by the trial judge, and likewise find them insufficient to establish an abuse of discretion in imposing this sanction. With respect to the requirement that Mr. Klayman submit a copy of Judge Keller's order with any future application for admission *pro hac vice* to the Central District of California, we note that Local Rule 2.3.2 itself requires that "each applicant for permission to appear pro hac vice shall present to the Clerk a written petition containing . . . (d) whether the applicant has been subjected to any discipline by any court or administrative body . . . (e) whether in the 3 years preceding the application the applicant has applied for permission to practice pro hac vice before any court within the State of California, together with the . . . disposition of each such application." Local Rule 2.3.2(d), (e).

We also reject appellants' contention, included in their motions concerning access to the transcript but not advanced in their brief on appeal, that this sanction was issued without due process. The record indicates that the items cited in the order were addressed by the trial judge and the parties as they arose during the trial; Mr. Klayman therefore had notice of the court's displeasure and an opportunity to respond both during the trial and, at length, after Judge Keller proposed the sanctions. *Cf. Engstrom*, 16 F.3d at 1012; *Leis v. Flynt*, 439 U.S. 438, 442-43 (1979).

D. Baldwin's Cross-Appeal for Full Attorney Fees and Costs under 35 U.S.C. § 285 and 15 U.S.C. § 1117(a)

Baldwin argues that cumulative misconduct by appellants, coupled with the district court's finding of willful infringement and FrankSu's failure to obtain advice of counsel

on whether Baldwin's patents were valid (a defense raised by FrankSu at trial), warranted a finding of "exceptional circumstances" under § 1117 of the Lanham Act and § 285 of the Patent Statute.[10] Baldwin asserts that the district court erred in not making such a finding and not awarding Baldwin full attorney fees for the proceedings below.

We apply the law of this circuit in reviewing the court's denial of fees under § 285. Whether exceptional circumstances exist under § 285 is a fact issue which we review for clear error. *Morton Int'l, Inc. v. Cardinal Chemical Co.*, 5 F.3d 1464, 1470, 28 USPQ2d 1190, 1195 (Fed. Cir. 1993). We find no clear error in the trial court's conclusion that exceptional circumstances did not exist in this case. Although the trial court found willful infringement, which we have held may suffice to find a case exceptional, *L.A. Gear, Inc. v. Tom McCan Shoe Co.*, 988 F.2d 1117, 25 USPQ2d 1913 (Fed. Cir.), *cert. denied*, 114 S. Ct. 291 (1993), the court also found that Mr. Frank Su did not know that trade dress is a protectable property right, and that Baldwin's patents and trade dress rights were not strong.

We also conclude that Judge Keller did not abuse his discretion in finding, based on his consideration of all of the circumstances of the case before him, that the case was not "exceptional" under § 1117(a) of the Lanham Act, an issue

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[10] Section 1117(a) of the Lanham Act provides that a "court in exceptional cases may award reasonable attorney fees to the prevailing party" who has established a violation of the rights of a trademark registrant. 15 U.S.C. § 1117(a). Section 285 of the Patent Statute contains identical language authorizing an award to the prevailing party in a patent suit. 35 U.S.C. § 285.

that we review with guidance from Ninth Circuit law. See *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1133 (9th Cir. 1986) (court did not abuse its discretion in denying fees under § 1117(a) even though defendants knew goods they sold were not genuine Polo).

E. Whether the District Court Abused its Discretion in Not Granting Baldwin Full Attorney Fees under 28 U.S.C. § 1927

Baldwin argues that the trial judge abused his discretion in not awarding Baldwin full attorney fees under section 1927 based on appellants' "pervasive vexatious conduct." The trial judge acknowledged that full attorney fees "could very well warrant extremely significant award of attorneys [sic] fees" but decided to award only fees for individual instances of vexatious conduct that multiplied the proceedings. The trial judge's determination not to award full fees to Baldwin was based on a thorough appreciation of appellants' conduct and its effect on the proceedings below, and we will not disturb that determination here.

F. Baldwin's Request for Fees and Costs under Fed. R. App. P. 38

Baldwin also seeks full fees and costs incurred in defending against this appeal and in responding to appellants' numerous and often improper filings in this court. We wish to make absolutely clear that appellants' conduct falls far short of the standards we expect from counsel appearing before us. Throughout this appeal, appellants have taken considerable liberties with the record and mischaracterized statements therein; peppered the court with motions seeking a free transcript that do not acknowledge or comply with the

standards for *in forma pauperis* treatment under 28 U.S.C.§1915; failed to file a timely Reply Brief despite an extension and then attempted to insert their arguments on reply in their transcript access motions; and, most deplorably, launched a charge of financial bias and conflict of interest against a district judge while utterly failing to mention, much less address, the provisions of law governing that serious allegation.

Nevertheless, we decline to grant Baldwin fees for litigating this appeal. Baldwin's refusal to cooperate in providing at least that portion of the transcript in its possession to appellants at the cost of copying is, in our view, poor practice (Baldwin agreed to provide its portion of the transcript to appellants at the $9,000 cost Baldwin paid for transcription). Given this court's urging that the parties cooperate in order to permit the fullest consideration of this appeal, we conclude that the proceedings on appeal were at least in part exacerbated by Baldwin's unwillingness to cooperate. We therefore deny Baldwin's fees for this appeal, although we award Baldwin its costs.

CONCLUSION

The December 9, 1991 and August 25, 1992 Orders imposing attorney fees and costs upon K&A are affirmed. The June 30, 1992 Order permanently barring Mr. Klayman from appearing *pro hac vice* before Judge Keller is affirmed. The trial court's finding that this case was not "exceptional" and therefore did not warrant full attorney fees under the Patent Statute or Lanham Act, is affirmed. Baldwin's request for fees under Fed. R. App. P. 38 is denied. The judgment of the district court is

AFFIRMED.

Costs are awarded to Baldwin.

APPENDIX B - MAY 22, 1996 APPELLATE COURT ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for

rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, GRANTED ONLY TO MAKE THE LANGUAGE CHANGES REFLECTED IN THE ATTACHED ORDER, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on May 29, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

By /s/
Brian P. LeDuc
Associate Chief Deputy Clerk

Dated: May 22, 1996

APPENDIX C - MAY 22, 1996 APPELLATE COURT ORDER MODIFYING MARCH 4, 1996 OPINION

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

PLAGER, Circuit Judge.

ORDER

The panel opinion of March 4, 1996 is modified as specified below:

1. Delete the following language on page 14 of the opinion:

> "As with his previous motions before the district court and this court, his latest submission provides no objective supporting data to support their claims of financial distress or justify this court's taxing the Federal Government with the considerable estimate bill for a complete transcript. A previous "Motion for Access" cites to "[f]inancial information filed under seal" that supports his claims, yet he made no effort to place this information before this court, under seal or otherwise. Also in support of the financial distress claim, the motion appends an exhibit that consists of a blank page with the bracketed statement, "[Contains financial information which has been deleted]." It need hardly be said that this is insufficient. Accordingly, we deny appellants' Renewed Motion for Access to the Transcript."

and replace with the following language:

> -- The documentation Mr. Klayman submitted in support of his claim of financial distress is insufficient to warrant taxing the Government with the considerable estimated cost of obtaining those portions of the transcript not in Baldwin's possession. Accordingly, we deny appellants' Renewed Motion to Access to the Transcript. --

2. Please revise the case citation on page 13, n. 6 of the opinion to read *Weller v. Dickson* instead of *Weller v. Dickinson.*

3. Replace citation to "Fed. Cir. R. 10(a)(1), (2), (4)," with -- Fed. R. App. P. 10(b)(1), (2), (4), --

FOR THE COURT

May 22, 1996
Date

/s/
S. Jay Plager,
Circuit Judge

APPENDIX D - SEPTEMBER 7, 1994 TRANSCRIPT OF ORAL ARGUMENT

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1185, -1186

BALDWIN HARDWARE CORPORATION,
Plaintiff/Cross-Appellant,

v.

FRANKSU ENTERPRISE CORPORATION, FRANK SU and DECORATORS ACCESSORIES, LTD.,

Defendants-Appellants,

and

KLAYMAN & ASSOCIATES, P.C., and LARRY KLAYMAN,

Appellants.

ORAL ARGUMENT OF
SEPTEMBER 7, 1994

Early Portion of Tape Inaudible

MR. KLAYMAN: -- does not necessarily mean that there is no ongoing appearance of a lack of impartiality in a financial interest. -- case stands for the proposition that if the average

person on the street would view this as a conflict, something that was incorrect, the judge has a duty to recuse himself and that's a mandatory duty.

Baldwin has raised the point that the case was already underway and that would waste judicial resources -- which nullified the court proceeding, even when the parties wanted it to proceed, after the fact, said, no it's not discretionary, the judge has to recuse himself under 455. This is the conflict provision of the law.

Now, we've also stated in our brief, and we make this argument as strongly here, that there was no conduct that was sanctionable. The conduct which was at issue, and we address it point-by-point in our brief and I won't belabor it, was of the type which was the type of advocacy to the extent that there were any errors made, it was inadvertent.

But what's really important here as well, and Baldwin does not refute this, is that the judge's order failed to make the requisite findings as required by law. Those findings has to be that we specifically acted in bad faith and that we intentionally, recklessly, and malicious, in effect, conducted this activity. None of those findings are there. And I know I've made reference, and I don't seek to equate myself to Mr. Steven Yagman in California, though he has raised issues of judicial bias, but in this Yagman case, which we also cite, and I'm going to read you a portion of that, the court said clearly, and this is the 9th Circuit which reversed sanctions orders against Mr. Yagman, Mr. Yagman of course claimed bias and prejudice Judge Keller. It said, at page 628, and this is cited in our motion for access to the transcript, 987 Fed. Rep. 2nd, Yagman v. Republic Insurance, p. 628: "Courts may not invoke these powers, that is to sanction, without a specific

finding of bad faith." This is the 9th Circuit and we're going under 9th Circuit law here, Your Honor.

THE COURT: No, but on numerous occasions, Mr. Klayman failed to explicit Court Orders. I'm reading from the Court's opinion. Why -- and then he goes on to specify the orders that were not obeyed.

MR. KLAYMAN: Your Honor, we went *seriatim* through each of those issues in our briefs and Your Honors will be able to see from those statements, and I'd be happy to address any one if you'd like to raise it, that we did not -

THE COURT: Well, why isn't failure to obey Court's order sufficient basis for sanctions?

MR. KLAYMAN: Your Honor, we maintain that we did not fail to obey. That we were trying to defend our client under difficult circumstances and to the extent that I made objections or speaking motions or whatever, at all times the record would reflect, and there are two provisions of the record which you do have. We weren't able to get the trial transcript, shows that I was very respectful for the Court both when I moved to disqualify the judge, I tried to point out that everyone is human and everyone may not see things. And after he sanctioned me, which he did without a hearing, and there was a denial of due process because I didn't have a hearing and the Evans case and the Potoshnick case stands for the proposition that I should have had an opportunity for a hearing and defend myself before he issued the sanctions orders. Your Honor, you'll see that I was very respectful. We submit we did not disobey orders. There were a few occasions where associates missed a filing deadline and that is not a failure to obey an order.

With regard to discovery, they asked for sanctions, Baldwin, with the magistrate --

THE COURT: -- to provide things within a certain time deadline, why is it not a violation of that order to miss that deadline?

MR. KLAYMAN: Because in this case, Your Honor, there was -- it was inadvertent. We obviously had no reason to miss it. We are a small firm. I had a young associate. I was out of the office. She missed the deadline. She asked Baldwin for permission and they said no problem, but you're going to have to move the court to change the scheduling order. They moved. Baldwin opposed that. We got fined for Baldwin's -- for what the judge termed an opposition. These are things that happen in litigation particularly on a three person firm that is trying to do this on the budget, which -- it's very, very hard. Baldwin spent a million to two million in this case. We haven't even been paid for the time that we've spent.

So, yes, those things happen. But that's not bad faith and that's not reckless and malicious and those are the findings that have to be made to sanction me in this way and these orders effect my whole livelihood. They affect my reputation; they affect our ability to continue; they affect our clients, and that's just simply not fair. Its particularly not fair, Your Honor, when I didn't have a hearing. When the judge, at the end of the trial said, here's how I'm going to sanction you, now Mr. Klayman, you may comment.

Well, that's not the hearing which is provided for the Evans case, and I'd just like to read a little section here, and this is dealing with *pro hac vice* orders.

> If a district court that has evidence of behavior that it believes justified, then denying an attorney admission of *pro hac vice*, it must set a hearing date and give the attorney adequate notice of all incident of alleged misbehavior or unethical behavior that will be charged against him. Specific allegations must be made. General allegations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with an adequate opportunity to defend himself and his professional reputation. The presiding judge must be sensitive to possible conflicts of interest, if events cast him into the role of witness, prosecutor and judge.

Now ironically, they supplemented the record, Baldwin, with a Yagman proceeding. Mr. Yagman had independent judges review his conduct. I did not. I had Judge Keller and he was the judge that respectfully was asked to recuse himself and as we said forth --

THE COURT: Mr. Klayman, you started saying that you had four specific issues in which you thought the judge erred and you started with financial conflict of interest but I don't know what happened to the other three, you want to mention those?

MR. KLAYMAN: Yes, thank you for bringing me back to that, Your Honor.

Conflict of interest, the conduct at issue, number two is not sanctionable because it is --

THE COURT: Number two is what?

MR. KLAYMAN: The conduct was not sanctionable. Three, the judge did not make the requisite findings, bad faith, reckless, malicious. Four, the case was infected with, not just conflict of interest, but *prima facie* showing of bias and prejudice. And there was a denial of due process. And let me address the last point because I was advised by the Clerk that our motion for access to the trial transcript could be taken up at this hearing which is currently pending.

THE COURT: It can indeed, but we are approaching your rebuttal time. Do you wish --

MR. KLAYMAN: I would be willing to go into that Your Honor. That would be okay.

THE COURT: Okay.

MR. KLAYMAN: I understand the rules of the court and respect them. We asked for the trial transcript, Your Honor, because, as you can see from the affidavits of Mr. Goldstein and Mr. Carter, which we submitted with that motion, and Mr. Goldstein is an independent witness, there are *prima facie* showings of extra judicial bias and prejudice. Statements about Mr. Carter and his ilk, who is Jewish. Statements about Mr. Frank Su, as the artful Taiwanese dodger. References to me as Mr. Schmuckler. Your Honor, I've never been one to be sensitive about this, but Schmuck is a Jewish/Yiddish word which means something pejorative. This was constantly referred to. There were statements about the appearance of Baldwin, how they looked so forthright and we did not. Statements like that and Your Honor, I sent in and I stated to the court yesterday a case, U.S. v. Borrero, where, and I just found it in preparing for oral argument, where Judge Keller was reversed for making extra-judicial statements like this on

the record. And I'm just going to quote one portion where he's talking about a Columbian that he sentenced because he was a Columbian, he gave him the maximum sentence and he said, this at page 1354:

> I just finished a case with two Columbian aliens. Not only aliens, illegal aliens. They come to this country and do you know what their view of this country is?

THE COURT: Is this part of our record?

MR. KLAYMAN: Yes, I cited it yesterday and we sent in a supplement, Your Honor of these citations.

THE COURT: This is not our case, right?

MR. KLAYMAN: This is not our case, it's a 9th Circuit case. It's at 887 Fed.2d, 1349, 9th Cir., 1989. They're reversing Judge Keller for discrimination against an Columbian and he stated: "Not only that --

THE COURT: Is there a discrimination against a Columbian in this case? I'm wondering why you're reading these things about a federal judge in my hearing here?

MR. KLAYMAN: The reason is, Your Honor, is because, we're stating that on the record is evidence of bias and prejudice --

THE COURT: I've read the record and I find a hard time reading a statement about a Mr. Carter and his ilk, as being anti-Semitic.

MR. KLAYMAN: Your Honor, there were --

THE COURT: Can you tell me what is anti-Semitic? I read that statement in context as being Mr. Carter and his type of witnesses who might come here and present evidence which I have ordered excluded from this trial. I could not find in my reading anything that suggested anti-Semitism or prejudice and bias.

MR. KLAYMAN: Well, Your Honor --

THE COURT: Those are very harsh allegations to make, Mr. Klayman.

MR. KLAYMAN: They are, Your Honor, we don't make them lightly and it doesn't give many any joy. I have never, ever accused anyone of anti-Semitism in my entire life and I don't wear it on my shoulder. I was married to a non-Jewish person. I am -- my girlfriend is non-Jewish. I don't walk around with that. But when it hits me in the face I have to address it and this court must address these kinds of allegations because, in fact, they exist and we cannot shirk that. And in this instance, the same type of statements were made and I call your attention to page 1354, the Borrero decision and in fact, he called Mr. Borrero, Mr. Borrero and his ilk, in chastising Colombians for not speaking the language, for being here to sell drugs and there was no showing that Mr. Borrero came from Columbia with drugs from that source such that he could sentence him to the highest sentence. The Court reversed and it found a finding that he discriminated based on national origin.

The only reason I raise this, Your Honor, is that under the Doctrine of Completeness, they have cited the record, but have not allowed us the opportunity to ourselves rebut. We thought these portions were going to be in the record, they

were not. They had said, leave that space. We need this Your Honor, to be able to show not just the legal inequities here but there is, as in the Liteky case, which the Supreme Court has and which Baldwin cited, a showing of discrimination based on race and national origin. These things do exist in society. To answer --

THE COURT: Just so I'm clear on something. The base case that you all were litigating has never been appealed, is that right?

MR. KLAYMAN: The -- it has not because the client could not afford that appeal.

THE COURT: And the appeal time has run?

MR. KLAYMAN: The appeal time has run.

THE COURT: That case is over.

MR. KLAYMAN: We're just talking about the sanctions here.

THE COURT: The only reason you're up here is the sanctions issue?

MR. KLAYMAN: Correct, Your Honor.

Now Baldwin has alleged that we should be sanctioned for everything that we did. This is a new allegation. They never raised these allegations with Judge Keller. They're asking that I pay $1 to $2 millions in attorneys fees. But I'm only up here for this. I think you and just to answer your question quickly, Judge Rader, I know I'm out of time, is that this was not the

only instance. This was not the only comment. I was called Mr. Schmuckler. Now, I think we all know what schmuck means. I don't raise that lightly in a court of law. I don't think any judge or person would do that.

There is a showing here. We asked for an opportunity to have Your Honor look at that record and that's something which the judicial process requires. You're my last chance, our last chance, and society's last chance to reverse something which is grossly unfair. We never had a hearing. I was sanctioned at the close of trial without ever being able to put on evidence, get a lawyer, do anything. You are my only hope. Thank you.

THE COURT: Thank you, Mr. Klayman. Mr. McBlaine.

MR. McBLAINE: Last night at 20 minutes after 4:00, I received, as I assume the Court did, a fax with two citations, one of which was this Borrero case alluded to. I think these two cases do not belong in the record. I could have been expected to be on an airplane to the District of Columbia from New York at that time. I was not. I'm prepared to address these cases.

The 9th Circuit --

THE COURT: I don't think cases are in the record, are they? Cases are in the corpus of law that we look at and if we found it or you found it or he found or nobody found it's part of the law world. I don't understand the reference to the record.

MR. McBLAINE: It's from Mr. Klayman's facts. He asked to supplement the record with these cases. But, that

being aside, I agree. These are cases are out there. Judge Keller addressed his dissatisfaction with Columbian drug dealers. The 9th Circuit found that he was in error. They found that it was permissible to, and he sentenced two people differently, the Columbian and the non-Columbian. He increased the sentence of the Columbian. Why? Because the Columbian was from a source country. A doctrine that has been recognized as permissible in the sentencing procedure. The 9th Circuit said, un-huh, you did it wrong, Judge Keller, you should have not looked where the party was from but where the drugs came from. Now they said take it back, and they remanded it to him his review and resentencing. The counsel for the defense said, no, no, don't send it back to Judge Keller, he's the guy that made these statements. They said, we find nothing in the record that suggests that Judge Keller cannot take this up on a reasonable basis and act appropriately on resentencing. We'll give it back to him. We have all the confidence in the world. The thing he did wrong, they spelled out for him to make that same sentence but not by reference to the Defendant's country of origin.

There -

THE COURT: Let me understand something, Mr. McBlaine. I understand that this case is over on the merits?

MR.: McBLAINE: It is.

THE COURT: Was over -- before this appeal even got entered, is that right?

MR. McBLAINE: That's correct.

THE COURT: What do you understand to be this jurisdiction in the case?

MR. McBLAINE: The jurisdiction here is Mr. Klayman's appeal from the sanctions that were awarded to us, the court's order denying him *pro hac vice* status before Judge Keller, and the failure of Judge Keller to recuse himself for financial interest.

THE COURT: I understand those facts --

MR. McBLAINE: But the jurisdictional --

THE COURT: -- the jurisdictional --

MR. McBLAINE: I do not know that the Court is without jurisdiction. It seems to me that orders coming out of the district court during the course of a trial, and they are permeated with, for example, patent issues, section 285, section 282, of the patent statute, are appropriately appealed to this case, so I think the jurisdiction is there.

THE COURT: Now, you're cross-appealing.

MR. McBLAINE: We cross-appealed.

THE COURT: And you're cross-appealing on the grounds that the Judge's conduct or perhaps more accurately, Mr. Klayman' s conduct -- do I have this correct, that Mr. Klayman's conduct was so bad that the judge erred in not sanctioning him more fully?

Mr. McBLAINE: That's correct, Your Honor.

THE COURT: Now that's a function of our knowing what happened in the trial, isn't that right?

MR. McBLAINE: That's exactly so.

THE COURT: Who has the transcript of what happened in the trial?

MR. McBLAINE: Ah -

THE COURT: Is that part of the record?

MR. McBLAINE: It is part of the record.

THE COURT: On this appeal?

MR. McBLAINE: It is not part of the --

THE COURT: There is a transcript somewhere?

MR. McBLAINE: I have three-quarters of the transcript and no more. Mr. Klayman makes the representation that we have the entire transcript and he should be granted access to it. That isn't the case. We have sufficient transcript to support our appeal.

THE COURT: Well, that's your view. You're asking us on the cross-appeal to review the behavior of counsel, and I assume both counsel, at the trial. Shouldn't the transcript be part of the record in this case?

MR. McBLAINE: The transcript, you're very rules provide that the appendix should not be burdened with the entire transcript --

THE COURT: Uh-huh.

MR. McBLAINE: And, indeed, Mr. Klayman makes the misrepresentation that we promised to have the entire transcript in the appendix. Well, we weren't going to do that. We read the court's rules. Mr. Butter sent him a letter and said leave open these numbers that would accommodate the entire transcript, we're going to include the pages to which we cite as the Federal Circuit rules require. Now, as I understand the Federal Circuit rules, the transcript is available under your rules by going to the district court clerk in the District of California. I don't know that Mr. Klayman has ever bothered to do that.

THE COURT: Does the district court have a transcript, is that what you're saying?

MR. McBLAINE: I can't tell you. I don't need to go there. The burden is on Mr. Klayman to get --

THE COURT: No, no, the burden is on this court now because you and Mr. Klayman have both raised to us that the conduct before the trial judge of the lawyers is relevant to some resolution of a dispute between you. We need to know what that conduct was from the beginning to the end. Ordinarily we are only interested in the parts of the transcript that relate to a particular issue on appeal. We don't want all the parts that deal with other issues. That's why we've written our rules the way we have. But what you are two are both arguing about is the conduct over time of both parties, attorneys.

MR. McBLAINE: That's correct.

THE COURT: Do I have that right?

MR. McBLAINE: That's correct.

THE COURT: So you can't be selective and just give us the things you want us to see. We have to see, or I assume we have to know what the conduct over time was of all of the lawyers, unfortunately we have to know that, if we're going to resolve the issues you all have proposed.

Now, somebody must have a transcript. If we want to read the transcript, where do we go?

MR. McBLAINE: You would go to me for three quarters of the transcript. You could go to the -- as I understand the rules, you could go to the clerk of the court who is required to keep the transcript and to make it available -- under the Federal Circuit rules, to a party in order to prepare their appendix. I prepared my appendix --

THE COURT: Isn't it part of the public record if it's filed with the clerk of the court?

MR. McBLAINE: Indeed it is. Mr. Klayman --

THE COURT: Well, then I guess -- would you explain to me what there is about the charge of $9,000.00 or $29,000.00 or whatever the sum is in order to make a copy of the transcript available?

MR. McBLAINE: Our client paid in excess of $30,000.00 for a daily copy of the transcript. In addition to the hundreds of thousands of dollars that they spent throughout the course of this protracted proceeding, protracted by frivolous motions,

abuse of conduct before the court. Our client -- it would be gravely unjust for our client to have to turnover to someone who hasn't satisfied any showing of indigence. I have no more reason to believe Mr. Klayman is indigent than the man in the moon.

THE COURT: Let me go back one step. A copy -- when you say you must go to you, if we want to read the transcript in order to decide the case before us, you say that the only available copy is available from your firm?

MR. McBLAINE: No, Your Honor, I'm saying you could come to me. As I understand your rules, and the rules of appellate procedure, a copy must be in the clerk's office in the Central District of California. It's there for Mr. Klayman. All he needs is a plane ticket to California. He won't -- he won't make the showing to be held in -- he won't pay the $9,000.00 that keeps the reporter in business. She won't hand it over. He tried. Judge Keller wouldn't order his reporter to hand over the transcript but there it is in your rules, that the transcript is lodged in the clerk's office in the Central District of California and it's available to the appellant to make his -- to make his appendix.

THE COURT: So you're saying it's not part of the public record? It must be obtained --

MR. McBLAINE: I believe it is part of the public record.

THE COURT: And I assume we can get it up here any time we want it?

MR. McBLAINE: I believe you can. But if the clerk of the Central District of California has lost is, I'll send you

three-quarters of it. I'll have to go through it and redact our notes and do all of that, which I would have to do if I copies it for Mr. Klayman.

THE COURT: We have a procedure that we can request it and it's sent here within days. Our clerk does this routinely. I've done it on many occasions.

MR. McBLAINE: I'm sorry, Your Honor?

THE COURT: We have a procedure whereby we can request it and it's here within days. That's clear. And district courts keep a version for public viewing as I understand and of course, if you want your own copy, you pay the charges to have it reproduced.

MR. McBLAINE: If this were the most important case of my life, and I didn't have that transcript, and I thought it cost $9,000.00, I'd sell my car, I'd mortgage my house. It cost me a lot more than that to go through law school and it's a big investment. I -- the court has never been satisfied of any *in forma pauperis* showing. It's just -- it's been so weak. There's been no factual showing, no documentation of that.

THE COURT: Do you have anything to say on the merits of the case?

MR. McBLAINE: On the merits, I do. We believe we're entitled to fuller aware of attorneys fees. Why? Because Judge Keller asked us to prepare for him a five-page memorandum setting for the transgressions of the defendants and counsel to permit a motion for him to look, to decide whether a motion would be appropriate. He looked at that and he awarded the sanctions on the basis of that five-page

memorandum. The list of wrongs in this case from start to finish never would fit on a five-page memorandum. Can't be addressed in 15 minutes. A typical -- the on recusal, the standard Mr. Klayman has put before you is incorrect.

On recusal, the leading case is a recently decided Supreme Court case, Liteky. The court finds -- bear with me for a second while I get back to the merits. In Liteky here is what the Court has to say. First, this goes to whether the occurrence have to be extra-judicial. There was an extra-judicial doctrine that was expounded in *United States v. Grinnell*, for example, another Supreme Court case. In Liteky just decided and not in my brief but provided to the Court afterwards with a letter and a copy to Mr. Klayman:

> First, judicial rulings almost never constitute valid basis for a bias or partiality motion. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings or a prior proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seeded favoritism or antagonism that would make fair judgment impossible.

Indeed, everything that Mr. Klayman cites comes right out of the proceedings.

THE COURT: Sir, I thought you were talking about the assertion of financial bias.

MR. McBLAINE: Oh, one -- I will indeed. On the -- but Mr. Klayman would have you believe that he moved for a recusal on the basis that Judge Keller was an anti-Semite. That never came up until appeal. After Mr. Yagman put

things in the press in California and Mr. Klayman jumped on that bandwagon. On the financial side of this, again, the case cited by Mr. Klayman is not authoritative.

THE COURT: But I thought you --

MR. McBLAINE: The 455(f) is the relevant statutory portion. It allows a judge, if the judge defines that it has a financial interest at the time of trial, or at some time during the proceedings when he has invested a certain amount of his time, if he divests himself of that financial interest, he can go forward with the case. Is there an appearance here of a partiality? My heavens no. No one in their right mind would say that there was partiality when the judge finally learns, at trial, two years later, that two years ago, his mother's trust, and which he's only a remainderman, his mother's trust, had some Masco stock and it was sold before the judge made any single decision in the case.

THE COURT: I always thought -- maybe I'm mistaken that this remitter or whatever it's called, required the consent of the parties.

MR. McBLAINE: Recusal?

THE COURT: No, if there is -- having a financial interest, is, as you know, absolute bar to participation in a case. I always thought that it required the consent of the parties to divest oneself of a financial interest in order to continue.

MR. McBLAINE: Under 455(f), I don't believe that's the case.

THE COURT: Do you -- are you acquainted with the Canons? I don't have them immediately in mind but I wonder if there isn't an obligation?

MR. McBLAINE: I looked only to the statute, Your Honor. And I didn't see any -- but I had in mind the 455(a) which is the appearance of a conflict.

THE COURT: Well, you do know that the Canons are more rigorous than the statute?

MR. McBLAINE: I think even under the canons, there is no question of an interest. At no point in this case, was a decision entered into while the judge has any kind of an interest in the outcome of the case.

THE COURT: I think -- do you have any questions? I think that we're out of time but I believe we have your position, Mr. McBlaine.

MR. McBLAINE: I would like to say that on the question on *pro hac vice*, order --

THE COURT: I do think were out of time. It's in your brief, is it not?

MR. McBLAINE: Yes, it is. Yes, it is.

THE COURT: Thank you. Thank you. The case is submitted. Thank you both.

CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings of Appeals Nos. 93-1185 and 93-1186.

/s/
Mary Workman, Transcriber

APPENDIX E - AUGUST 4, 1994 AFFIDAVIT OF RICHARD CARTER

I, Richard Carter, declare as follows:

1. I was President of Decorators Accessories ("Decorax"), a U.S. importer of bathroom accessories.

2. I have been in the bathroom accessories and door hardware industries for over 50 years. Previously, my wife Phyllis and I owned Phylrich, a well known and well respected bath hardware manufacturer. The firm was later sold.

3. Decorax was a defendant in the case of Baldwin Hardware Corporation v. Franksu Enterprise Corp., et al., in the United States District Court, Central District of California, Civil Action No. 90-4919 WDK (Bx).

4. It is well known in the industry, and generally, that the bathroom accessory and door hardware industry was primarily owned by Jewish interests. A notable exception is Masco, the parent company of Baldwin Hardware Corporation. I have never been a type of person who was sensitive of anti-Semitic behavior, as I am rather secular and somewhat agnostic. However, during a trial in Los Angeles federal court, with Baldwin, I surprisingly witnessed incredibly discriminatory behavior and ridiculing anti-Semitic comments, by the trial judge. I found this behavior to be extremely disturbing, as I always thought of judges as fair and impartial individuals.

5. The Honorable William D. Keller presided over the trial held in May, 1992.

6. Judge Keller repeatedly screamed at my attorney, Mr. Larry Klayman, and sarcastically and directly addressed Mr. Klayman as "Mr. Schmuckler." The word "Schmuck" is a Jewish/Yiddish term of negative meaning the male genitalia. In my view, Mr. Klayman did not deserve this treatment. He was essentially representing my firm and me for free and he was doing the best he could with limited resources. In my view, Mr. Klayman is both an honorable and honest person who believed in my case and always acted with the highest degree of integrity and professionalism.

7. Judge Keller questioned the integrity and honesty of myself and other witnesses appearing on behalf of Decorax and Franksu, while he simultaneously openly complimented the physical appearance and demeanor of Baldwin's witnesses and counsel. Judge Keller also repeatedly accused Mr Steve Goldstein, our key witness, of lying and continually made fun of his last name by mockingly emphasizing and incorrectly pronouncing the last syllable of his last name - "stein." Judge Keller called me, my family and my colleagues "Mr. Carter and his ilk." I took this as making fun of my Jewish heritage.

8. Judge Keller ridiculed Mr. Frank Su, a Taiwanese manufacturer of bathroom accessories, whose products Decorax imports, by calling Mr. Su the "artful Taiwanese dodger" and on several occasions he mocked Mr. Su's lack of ability to speak English and cast dispersions on his Taiwanese heritage.

9. Judge Keller became extremely agitated with the Chinese interpreter who was interpreting for Mr. Su, for occasional difficulties or delays in making certain translations. Judge Keller would become upset for no apparent reason and

unnecessarily begin to scream at the interpreter. In my opinion, he treated her badly.

9. Judge Keller made unsolicited commentary that some a lot of the attorneys he worked with were Jews (sic).

10. Judge Keller would not allow my attorney to consult with me during court recesses, and incredibly, would not allow my attorney to make objections. This is despite the fact that Mr. Klayman was trying to defend me from charges by Judge Keller and Baldwin's lawyer that I am dishonest and had lied. The lawyers who represented Baldwin were not prevented from making objections.

11. Judge Keller told my attorney that his conduct in Case No. 90-4919 WDK (Bx) could have an impact on a totally separate case that Decorax filed against Baldwin. Judge Keller would be the judge assigned to this case as well.

12. After the trial began, Judge Keller revealed that he held stock in the parent corporation, of Baldwin, while the case was ongoing, which he owned as a beneficiary to his mother's trust. When I found this out, and because of Judge Keller's apparent prejudice, I asked Mr. Klayman to ask the judge to step aside from the case, but the judge refused. I found this incredible, as I thought that the judge would be conflicted and would favor Baldwin as he had an interest in the stock of its parent.

13. As stated above, Judge Keller also accused Mr. Steve Goldstein, the president of one of Decorax's distributors, of being dishonest. Judge Keller repeatedly treated Mr. Goldstein as an inferior person, not only mocking his name but his character. I have known Mr. Goldstein a

long time and in my view he is one of the most honorable and decent people I have ever dealt with. His company -- West End West -- of Laguna, California, is an outgrowth of his long existing, family owned business in Philadelphia. In fact, Baldwin sells to Mr. Goldstein's family and, if it is honest, Baldwin can vouch for his honesty and integrity.

14. I found Judge Keller's biased conduct and statements, which continued throughout the course of the trial and were only directed at defendants and Mr. Klayman, to be extremely troubling, damaging to my case, and I was surprised that this was allowed to happen in a court of law.

Sworn to under penalty of law.

Dated August 4, 1994

/s/
Richard Carter

APPENDIX F - AUGUST 6, 1994 AFFIDAVIT OF STEVEN GOLDSTEIN

AFFIDAVIT

I, Mr. Steven Goldstein, being sworn, state as follows:

1. I am President of West End West, a U.S. importer of bathroom accessories. I have been involved in the hardware and bathroom accessories industry for many years.

2. In May of 1992, I was the key witness for defendants during a trial in the United States District Court for the Central District of California. The case was Baldwin Hardware Corporation v. Franksu Enterprise Corp., et al. and the judge assigned to the case was William D. Keller.

3. My testimony was crucial to the case, as I was very familiar with and had seen bathroom accessory products that had been on the market long before the Baldwin patents were applied for, which were identical to Baldwin's products. Specifically, in April of 1992, I informed Mr. Larry Klayman, attorney for defendants, of a line of bathroom accessories manufactured by Sepco, which were identical to the bathroom accessories manufactured by plaintiff, Baldwin Hardware Corp. Mr. Klayman was surprised and pleased when he received this information.

4. When I testified to this fact at the trial, Judge Keller accused me of "mistaken beliefs."

5. In addition to accusing me of perjury, Judge Keller repeatedly made fun of my last name and pronounced it in a mocking way by emphasizing and mispronouncing the last

syllable -- calling me Mr. Goldstein. I was shocked that a federal judge was mocking me and obviously, the fact that I am Jewish. He also acted as if he disbelieved me about my reason for being late for one day of trial testimony. I arrived late because the train from Irvine to Los Angeles had to stop because a person had jumped onto the tracks near Anaheim and was hit by the train and was killed. The police investigation delayed the train. When I did arrive the judge was in his chambers and was notified. He then kept us waiting about an hour until he decided to take the bench. I firmly believe that the Judge's remarks and attitude about me show anti-Semitic tendencies.

6. I was also offended by Judge Keller's remarks. When I provided my testimony, I swore under oath to tell the truth. I am an ethical and honest businessman, and I am well respected in the bathroom hardware and accessories industry from many years in the industry. Ironically, my family in Philadelphia had done and continues to do business with Baldwin Hardware Corporation. I thus had no reason to not tell the truth at trial.

7. In addition, Judge Keller was very rude to the Chinese interpreter and treated her like an inferior person.

Sworn to under penalty of law.

Dated August 6, 1994

/s/
Steven Goldstein

Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

No. 96-287

IN THE

Supreme Court of the United States

October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,

Petitioners,

v.

BALDWIN HARDWARE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of Record

Questions Presented

1. Can an appellant who cannot establish a right to *in forma pauperis* treatment under 28 U.S.C. § 1915 demand a free transcript of the proceedings thus taxing the cost of a trial transcript to the United States?

2. Have procedural safeguards been satisfied where a sanctioned attorney was on notice of the conduct which formed the basis for the sanctions, was given an opportunity to respond before the sanctions order was entered, and was given over six weeks to file a motion for reconsideration of the sanctions order?

3. Where a court has specified the conduct which forms the basis for sanctions imposed pursuant to its inherent powers or pursuant to 28 U.S.C. § 1927, and the record otherwise supports a finding of bad faith, is an express recitation of the words "bad faith" required for a district court's sanctions order to be upheld?

4. Can sanctions entered against a contumacious attorney pursuant to a court's inherent powers be affirmed where the trial court has provided specific notice of the conduct which forms the basis for the sanctions, and has reasonably conveyed to the attorney its belief that the cited conduct constitutes bad faith?

Statement Pursuant to Rule 29.6

The parent company of Baldwin Hardware Corporation is Masco Corporation.

The following is a list of affiliates which have issued shares to the public and which are owned by Parent Masco Corporation:

Galveston Houston Company
Masco Tech, Inc. (formerly Masco Industries, Inc.)
TriMas Corporation
Comfortex Corporation
Furnishings International, Inc.
Emco Ltd.

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No. 96-287

IN THE

Supreme Court of the United States

October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,

Petitioners,

v.

BALDWIN HARDWARE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Baldwin Hardware Corporation prays that a writ of certiorari to review the judgment of the Federal Circuit in its cause Nos. 93-1185, -1186, entered on March 4, 1996 and modified on May 22, 1996, be denied. (For the convenience of the Court, all citations to the Opinion will be to the opinion attached as Appendix A to the Petition, and all citations to the oral argument on appeal will be to the transcript attached as Appendix D to the Petition).

Statutes and Rules Involved

28 U.S.C. § 455 (a), (b) and (f) - Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself of herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 1915(a) and (b) – Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

28 U.S.C. § 1927 - Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Federal Rule of Appellate Procedure 10(a), (b) and (c)

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. - The record on appeal consists of the original papers and exhibits filed in the district court, the transcripts of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. - If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

Central District of California Local Rule 2.2.3.1 - Permission pro hac vice

Any person who is not otherwise eligible for admission to practice before this Court, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court, or of the highest court of any State, Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear before this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate pro hac vice in a particular case.

Canon 3(C)(4) of the Code of Judicial Conduct for United States Judges provides:

Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge, spouse, or minor child, as the case may be, divests himself

of herself of the interest that provides the grounds for the disqualification.

Statement of the Case

The underlying litigation from which the issues now before this Court have emerged involved a patent infringement and unfair competition dispute between Respondent Baldwin Hardware Corporation ("Baldwin"), and FrankSu Enterprise Corporation, Frank Su, and Decorators Accessories, Ltd., each of whom were represented at trial by Petitioner Larry Klayman and his law firm Klayman & Associates.

During trial on the merits before Judge William D. Keller in the U.S. District Court for the Central District of California, Judge Keller apprised the parties of the past ownership by Judge Keller's mother's trust of stock in Masco Corporation ("Masco"); the parent company of Baldwin. Judge Keller was a beneficiary. The stock had been sold before Judge Keller's substantive involvement in the litigation, and before Judge Keller had any knowledge that Baldwin was owned by Masco. Petitioner Klayman first agreed that there was no conflict, but subsequently brought a motion for recusal alleging that Judge Keller had a financial conflict of interest. (A. 23-27).

Having been taken to task by Judge Keller for improper behavior, Petitioner Klayman also alleged that Judge Keller had exhibited bias against his client, and referenced several comments made by Judge Keller during trial as indicative of this bias. (A. 23-27). Petitioner Klayman did not indicate that he considered any of these remarks to be anti-Semitic or ethnically biased. Judge Keller fully addressed each point raised by Mr. Klayman, and denied the motion for recusal. (A. 6-17).

Near the end of trial, based upon repeated and profound misconduct, Judge Keller *sua sponte* apprised Petitioner Klayman of his intention to revoke Mr. Klayman's future *pro hac vice* rights

as sanctions for the conduct he exhibited during trial. (A. 18-22). Numerous instances of objectionable conduct were specifically recited by Judge Keller, and Mr. Klayman was given an opportunity to respond. On June 30, 1992, after the trial was completed, the sanctions order was entered. (A. 1-3). Baldwin was awarded a small part of its attorneys' fees that it had asked for under 28 U.S.C. § 1927.

Petitioner Klayman then filed a motion to stay the order and to allow 60 days to file a motion for reconsideration. (A. 28-30). Judge Keller granted the motion to stay and granted 30 days from that date to file the motion. (A. 4). In his order, Judge Keller clearly stated that no further extensions of time would be granted. Nevertheless, on August 12th, five days before the 30 day extension was to expire, Petitioner Klayman again filed a motion for an extension of time, which was ultimately denied. (A. 31-35). On August 17th, Petitioner Klayman filed his motion for reconsideration; a motion which was completely devoid of any challenge to the legal basis for the sanctions, or the manner in which they were imposed. (A. 36-39). The motion for reconsideration was denied, and the previously imposed stay on the sanctions order was lifted. (A. 5).

Subsequently, Petitioner repeatedly sought to obtain a trial transcript at a reduced cost by alleging financial distress. These requests were denied by the district court for failure to supply objective evidence of financial distress. Similar motions were repeatedly brought to the Federal Circuit. (Op. at App. 13-14). These too were denied. Petitioner Klayman chose not to purchase a transcript and did not supply one with his appeal to the Federal Circuit as required. He now claims the transcript that he failed to submit was essential to the Federal Circuit's review (Pet. at pp. 14-16).

On appeal, the Federal Circuit held that 28 U.S.C. § 455(f), which provides for divestiture of a belatedly discovered financial interest, squarely covered the facts of the case before it. The court

found that because the stock had previously been sold by the trust, Judge Keller was not required to recuse himself. With regard to the issue of alleged ethnic bias, raised for the first time on appeal, the court questioned whether this issue was properly before it. Nevertheless, the Federal Circuit found that the record did not support the allegations.

Argument

I. AFFIRMANCE OF THE SANCTIONS IMPOSED AGAINST PETITIONERS DOES NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

A. The Issue of Recusal for Alleged Ethnic Bias Is Not Properly Before This Court.

To the extent that Petitioners' arguments for recusal are based on allegations of "religious and nationally-based extra-judicial bias and prejudice", Pet. at p. 15, these arguments are not properly before this Court. Until the appeal to the Federal Circuit, allegations of ethnic bias were never raised by Petitioners. The transcript of the Klayman oral motion for recusal confirms that the only specific incident raised by Mr. Klayman on which he now relies as evidencing ethnic bias, is Judge Keller's reference to Richard Carter "and his ilk".[1] (A. 24). Never at the trial level did he so much as infer a belief that he considered this, or any other later cited comment, to indicate ethnic bias.[2] (A. 23-27).

---

[1] Judge Keller, a wordsmith, used "ilk" correctly. It means "kind." *Webster's Third New International Dictionary* 1126 (3d ed. 1986). The word is not pejorative. The late Ogden Nash correctly used the word, without pejorative intent when he wrote "The cow is of bovine ilk, one end moo, the other milk." Nash clearly harbored no ill will to cows.

[2] Witness Carter was president of defendant Decorators Accessories Ltd., a hardware distributor. His ethnic background was never mentioned at trial nor at any other time until it became an issue for Petitioners' appeal. His "ilk" or kind were fellow hardware distributors.

Furthermore, Judge Keller's response to the recusal motion gives no indication of any such allegation. (A. 6-17).

In its opinion, the Federal Circuit acknowledged the potential impropriety of this issue on appeal by stating

> Appellants never directly presented the issue of ethnic or racial bias to Judge Keller as a ground for recusing himself, nor did they afford Judge Keller an opportunity to address this issue. Under the circumstances, we question whether the matter is properly before us on appeal ... .

Op. at App. 9-10. Although the Federal Circuit did proceed to address the issue, it was correct in questioning whether the matter was properly before the court. Under circumstances where the grounds for a recusal motion would have been known long before a decision on the merits, the accusation was not made until after a decision was rendered. A motion for recusal is not timely if brought for the first time on appeal.

In *E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327 (9th Cir. 1992), the judge's previous involvement with a party's counsel's firm was known by the defendant at the time the case was transferred to the judge, but disqualification was not sought until appeal. The court stated that although a judge may be obligated to recuse himself under 28 U.S.C. § 455, "it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment ...". *Id.* at 1343. *See also United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.) (motion for recusal based on allegations of personal bias against the defendant was held untimely since alleged incidents were known to defendant prior to appeal), *cert. denied*, 459 U.S. 1012 (1980). Likewise, the Fifth Circuit in *Delesdernier v. Porterie*, 666 F.2d 116, 119 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982), also refused to consider a motion for disqualification

which was raised for the first time on appeal and after a trial on the merits.

As in *E. & J. Gallo*, Petitioners belated (and baseless) allegations of ethnic bias represent an improper, after-the-fact attempt to attack an unfavorable judgment, and should not be entertained by this Court.[3]

B. Petitioners Cannot Tax the Cost of a Trial Transcript to the United States Where They Have No Right to *In Forma Pauperis* Treatment Under 28 U.S.C. § 1915.

Petitioners allege that their due process rights have been violated by the Federal Circuit's failure to independently obtain and review a transcript of the trial. A closer examination of the facts of this case, however, reveals that Petitioners are merely attempting to tax the cost of the transcript to the United States, after being conclusively found not entitled to *in forma pauperis* treatment.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that a state cannot deny appellate review solely on the grounds that the appellant is too poor to obtain the required transcript. In the present case, however, 28 U.S.C. § 1915 provides the precise relief which was unavailable in *Griffin*; it allows an appellant to tax the cost of a transcript on appeal to the United States if that appellant is indigent. Petitioners have twice failed to provide information sufficient to establish a right to *in forma pauperis* treatment. As a result, Petitioners were refused a free transcript. This decision was never actually contested on appeal. Petitioners

[3] As they did before the Federal Circuit, Petitioners make much of Judge Keller's likening Mr. Klayman to another troublesome attorney, a Mr. Schmuckler. Judge Keller did not call Mr. Klayman by this name, nor did he concoct it. Mr. Martin L. Schmuckler had previously appeared before Judge Keller. *See United States v. Nazareth Andonian*, 735 F. Supp. 1469 (C.D. Cal. 1990).

are not entitled to *in forma pauperis* treatment or the transcript they declined to purchase.

In circumstances where an appellant cannot establish a right to *in forma pauperis* treatment under § 1915, the Federal Rules of Appellate Procedure require the appellant to "order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary." Fed. R. App. P. 10(b). If the appellant fails to supply the appellate court with a record sufficient to decide the issues set forth on appeal, the appellate court may affirm the lower court's ruling without considering those issues. *See, e.g., McGinnis v. Gustafson*, 978 F.2d 1199, 1200-01 (10th Cir. 1992) (appellant's failure to file required transcript left "no alternative but to affirm"); *McDonough Marine Serv., Inc. v. M/V Royal Street*, 608 F.2d 203, 204 (5th Cir. 1979) (lack of trial transcript which was essential to determination on appeal left court with no alternative but to affirm); *Hernandez v. 65 de Infanteria Thom McAn, Inc.*, 516 F.2d 1293, 1296-97 (1st Cir. 1975) (affirmed district court's refusal to accept claim of good faith since appellant did not provide court with transcript).

Petitioners failed to establish a right to *in forma pauperis* treatment, and they failed to fulfill their obligation of supplying a record for appeal. Like the apocryphal, the patricide defendant pleading for the court's mercy as an orphan, Petitioner Klayman now seeks to avoid the implications of his own malfeasance, arguing that his due process rights were violated because the Federal Circuit did not review in its entirety a transcript he declined to provide.[4] In effect, Petitioners seek a ruling from this Court that fiscally sound appellants may transfer the financial burden of supplying a transcript on appeal to an appellate court, their adversaries or the court reporter, all of whom in this case adamantly refused to be taken advantage of. Surely due process does not require a ruling in Petitioners' favor.

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[4] The District Court does not itself possess a transcription of the tapes of the trial proceedings. (Op. at App. 13, n. 5).

C. Due Process Was Not Denied When the Federal Circuit Did Not Address Non-Binding Judicial Ethical Standards Never Raised or Relied on by Petitioners.

The Petition to this Court states:

> "While Petitioners had relied on the Judicial Code of Conduct in support of their arguments that the trial judge's orders must not be given any force or effect due to the appearance of extra-judicial bias and prejudice and a financial conflict of interest, the Federal Circuit failed to address it in its decision."

Pet. at p. 10. This clearly mischaracterizes the record. Petitioners never raised, let alone relied on, the Code of Judicial Conduct (the "Code") in their oral motion for recusal, in their Appeal Brief to the Federal Circuit, or in their oral argument before the Federal Circuit. In the only mention of the Code prior to the Petition to this Court, the Federal Circuit referred to the Canons during the following colloquy with respondent's counsel:

> THE COURT: Do you -- are you acquainted with the Canons? I don't have them immediately in mind but I wonder if there isn't an obligation?
>
> MR. MACBLAIN: I looked only into the statute, Your Honor. And I didn't see any -- but I had in mind only the 455(a) which is the appearance of a conflict.
>
> THE COURT: Well, you do know that the Canons are more rigorous than the statue?

(Arg. at App. 52). The Judicial Canons were only mentioned in passing by the Federal Circuit. They formed no part of the arguments on appeal.

Regardless of Petitioners' failure to raise or rely on the Canons, the Code of Judicial Conduct are non-binding guidelines for conduct. They do not provide an independent basis for appeal. "[T]he Code is not designed or intended as a basis for civil liability or criminal prosecution." *Code of Conduct for United States Judges*, Canon 1, commentary (1992). *See also In re Charge of Judicial Misconduct*, 62 F.3d 320, 322 (9th Cir. 1995) ("[t]he Canons are aspirational goals, voluntarily adopted by the judiciary itself, designed to provide guidance ... , but those ethical standards should never supersede the congressionally set standards for the imposition of discipline."); *Pashaian v. Eccelston Properties, Inc.*, 88 F.3d 77 (2d Cir. 1996) (the Code of Judicial Conduct is not independently enforceable on appeal).

Finally, and equally as compelling, the Petitioners allegations of a financial conflict of interest is utterly frivolous; Canon 3 of the Code of Judicial Conduct follows 28 U.S.C. § 455(f) almost verbatim:

> Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he ... individually ... has a financial interest in a party ... disqualification is not required if the judge .... divests himself or herself of the interest that provides the grounds for the disqualification.

Petitioners include this provision of Canon 3 in their Petition under "Rules Involved" (Pet. at pp. 4-5), but it is conspicuously absent from their legal argument.

The argument that due process was denied by the Federal Circuit's failure to refer to a Canon containing an exception virtually identical to the statutory exception on which the court relies in reaching its decision is both untenable and frivolous. Even if the Canons had the force of law, they do not provide "more stringent" standards than those on which the district and appellate courts relied.

In their argument that the Federal Circuit failed to address the Judicial Canons, Petitioners assert that the Federal Circuit failed to address "black letter" case law that only an appearance of impartiality is necessary to disqualify a trial judge. (Pet. at p. 20.)

The Federal Circuit in fact stated:

> In the interest of ensuring that justice not only is impartial *but appears so*, we have reviewed the record to determine in the first instance whether it would have constituted plain error for Judge Keller to have refused recusal under § 455(a) and (b)(1) (emphasis added).

Op. at App. 10. The Federal Circuit thus properly considered whether an appearance of impartiality required recusal.[5] The basic tenet of avoiding even the appearance of impropriety is so fundamental to bench and bar as not to require research and lengthy exposition.

---

[5] An appearance of impartiality is still governed by an objective standard of reasonableness. It must be such that a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996).

D. The Notice and Opportunity Given to Respond in This Case Fully Satisfies Any Procedural Safeguards Which May Be Required.

Petitioners raise procedural due process for the first time here. It is not properly before this Court.

Central District of California Local Rule 2.2.3.1 provides that attorneys who are in good standing of a bar of any United States Court, and are of good moral character, *may* in the *discretion of the court*, be admitted to appear *pro hac vice* in a particular case. As indicated by the Federal Circuit, a court which has the power to admit attorneys *pro hac vice* also has the power to sanction them for unprofessional conduct. Op. at App. 21-22 (*citing Standing Committee on Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir. 1984)). Petitioners assert that before a court can exercise this power to sanction an attorney by denying that attorney future *pro hac vice* rights, it must provide "a full panoply of procedural safeguards." Pet. at p. 22. However, Petitioners gloss over the facts of the present case. They were provided with particularized notice of the bad faith conduct for which they were sanctioned, they were given an opportunity to respond to the charges when they were first raised at trial, and they were given almost seven weeks from the time the order was entered (the order was stayed during the majority of this time) to obtain counsel and prepare a motion for reconsideration. Despite notice and opportunity, Petitioners made no response. Now Petitioners seek a further chance to challenge the sanctions by their tenuous due process argument.

The *pro hac vice* sanctions were first raised *sua sponte* by Judge Keller at the end of a trial prolonged and disrupted by Petitioner Klayman's misbehavior. Judge Keller specifically pointed out instances of conduct which "seriously violated the standards of practice," including "misrepresentations" made to the court. (A. 19-21). This conduct was spelled out again in Judge Keller's June 30, 1992 order imposing sanctions. (A. 1-3). Petitioners were aware of the conduct that formed the basis for the

sanctions. As recognized by the Federal Circuit, it was also clear that Judge Keller considered Petitioners' "misrepresentations" to constitute bad faith. Op. at App. 22.

Petitioners cite *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350 (3d Cir. 1990); *In re Evans*, 524 F.2d 1004 (5th Cir. 1975); and *In re Yagman*, 796 F.2d 1165 (9th Cir. 1896), to support their due process argument. In *Jones*, the court did state that prior to sanctioning an attorney, "a court must provide the party to be sanctioned with notice and some opportunity to respond to the charges." *Jones*, 899 F.2d at 1357. The notice and opportunity referred to in *Jones*, however, was later qualified in *Fellheimer, Eichen & Braverman v. Charter Techns., Inc.*, 57 F.3d 1215 (3d Cir. 1995) ("*FE&B*"), a case in which the facts and legal issues closely resemble those presently before this Court.

In *FE&B*, the court held that adequate notice had been given where the sanctioned party was aware of the objectionable conduct, and was aware that it was accused of having acted in bad faith. *Id.* at 1225-26. As support for its finding of adequate notice, the court cited to the following statement made by the court during the hearing:

> [F]or Mr. Burke to get upset because the creditors committee thinks that he's incompetent, is unfortunate. You ... have to tone him down. You can't file this kind of lawsuit that you filed here just because Mr. Burke is upset. That's ridiculous ... [T]his whole litigation is a lot of nonsense.

Thus, the Third Circuit found adequate notice where the court had pointed out the conduct which formed the basis for the sanctions, and did so with language which reasonably conveyed a belief that bad faith was present. Likewise, in the case at bar, specific acts of conduct were cited in a manner that clearly conveyed the district court's belief that, at the very least, Petitioners' misrepresentations constituted bad faith. While the notice in *FE&B* was given before

the sanctions order was entered, the court's rationale is equally applicable to the present case where Petitioners were given an opportunity to respond both before the sanctions order was entered, and while the sanctions order was stayed pending an opportunity for Petitioners to submit a motion for reconsideration. (Judge Keller considerately placed the sanctioning order under seal awaiting petitioners' motion; (A. 4)).

The *Evans* case, also cited by Petitioners, does not support Petitioners position. *Evans* involved a judge's attempt to deny an application for admission *pro hac vice* based on an attorney's actions in previous unrelated proceedings before that judge, rather than as sanctions for conduct in a case pending before him. The attorney received no notice during these previous proceedings that his conduct was objectionable, and he was not allowed to participate or address the court in support of his motion for admission *pro hac vice*. This is a stark distinction to the careful actions of Judge Keller. In contrast, in the present case Petitioner Klayman was apprised of Judge Keller's displeasure with his actions when the sanctions were raised at trial, and he was given an opportunity to respond at trial and an extended opportunity to respond in a motion for reconsideration.

Finally, contrary to Petitioners' assertions, the facts of this case did not require a different judge to preside over the sanctions issue. Confrontations between an attorney and a judge during trial over issues arising out of the trial, without more, do not provide grounds to remove from that judge the power to impose sanctions. The Ninth Circuit in *Yagman* reached precisely this conclusion, stating

> ... although it is obvious that Yagman and Judge Real clashed several times during the trial over various objections, evidentiary matters, and rule violations, we find none of it remarkable enough to indicate a need for Judge Real to disqualify himself from deciding the issue of sanctions. A judge may

> impose sanctions ... at his or her initiative. When this occurs, the judge will obviously be dissatisfied with some aspect of the offending attorney's conduct. Often the judge will be angry with the attorney for violating one or more rules. Without more, this natural responsive attitude does not provide reasonable grounds to question the judge's impartiality, either because of the appearance or the fact of bias or prejudice, in presiding over the sanctions proceeding.

Yagman, 796 F.2d at 1182. Petitioners have not and cannot show that Judge Keller's criticisms of Mr. Klayman were anything more than natural and reasonable reactions to Mr. Klayman's continuous refusals to follow court instructions, misrepresentations, delays and antagonizing tactics. Under such circumstances, due process did not require a different judge to supervise the sanctions issue. No case so holds.

The particularized notice and the ample opportunity to respond given to Petitioners in this case fully satisfies any procedural safeguards that may be required before a court may enter *pro hac vice* denial sanctions.[6] After their failure to avail themselves of the opportunity, Petitioners' due process argument is nothing more than an attempted second bite at an unavailing apple. Due process does not require, and the interests of justice dictate against, awarding Petitioners this second bite.

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[6] The denial of future *pro hac vice* admission and the requirement of notification of other judges of the district in future applications was exactly correct as the court found that in applying for *pro hac vice* admissions Mr. Klayman had falsely stated that he had never previously been sanctioned.

II. AFFIRMANCE OF THE SANCTIONS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

A. Affirmance of Sanctions Under Circumstances Where the Record Independently Supports a Finding of Bad Faith Does Not Conflict With the Law of Other Circuits.

Sanctions issued pursuant to either 28 U.S.C. § 1927 or a court's inherent powers require a finding of bad faith. The Federal Circuit found bad faith. No case requires that a district court expressly recite the words "bad faith" in its sanctions order as Petitioners suggest. Affirmance of sanctions on appeal is proper where the record otherwise supports a finding of bad faith. There is no conflict among the Circuit Courts of Appeal on this issue.

1. Sanctions Under 28 U.S.C. § 1927

In *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1347 (2d Cir. 1991), cited by Petitioners, the Second Circuit expressly stated that an appeals court may affirm sanctions "on any ground that finds support in the record." Remand was necessary, however, because, contrary to this case, the record was unclear as to which acts the district court had relied on for sanctions imposed under both Rule 11 of the Federal Rules of Civil Procedure and under § 1927. "[T]he present record is too obscure to leave us comfortable in reaching out for alternative grounds to affirm." *Id.*; *see also*, *MGIC Indemnity Corp. v. McKenna, Conner & Cuneo*, 952 F.2d 1120, 1122 (9th Cir. 1991) ("In some § 1927 cases we have examined the record when the district court's sanction order did not contain an explicit finding of bad faith.").

Similarly, in *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995), also cited by Petitioners, a sanctions order was vacated on appeal since the district court did not specify *any* conduct, thereby

rendering the court's task of determining whether the district court properly exercised its discretion "impossible on the record now before us." *Id.* at 1264. Thus, the order was vacated because the record could not support a finding of bad faith, not because the district court did not expressly recite a finding of bad faith in the order as Petitioners aver.

The above decisions also indicate that sanctions issued under § 1927 may be affirmed on appeal, despite the absence of a specific recitation of the words "bad faith," so long as the record otherwise supports such a finding. Petitioners have cited no law to the contrary. In fact there is no conflict of law among the circuit courts of appeals.

In this case, the Federal Circuit held that the record "leaves no doubt that [Judge Keller] considered K&A's conduct with regard to the proceedings for which sanctions were imposed to be at least reckless," and that the "record supports Judge Keller's assessment." Op. at App. 20. Recklessness *is* bad faith. *MGIC*, 952 F.2d at 1122. Affirmance of the sanctions by the Federal Circuit was entirely proper.

2. Sanctions Issued Under the Court's Inherent Powers

Similarly, where the record supports a finding of bad faith, sanctions issued pursuant to a court's inherent powers are affirmed even without actual utterance of the words "bad faith."

In *Fellheimer, Eichen & Braverman v. Charter Techn., Inc.*, 57 F.3d 1215 (3d Cir. 1995) ("*FE&B*"), discussed, *supra.*, at pp. 17-18, the Third Circuit upheld a sanctions order under precisely such circumstances. In *FE&B*, the bankruptcy court which imposed the sanctions never made an express finding of bad faith. The Third Circuit upheld the sanctions after concluding that FE&B had notice of the conduct which the court relied on, and was aware that it stood accused of acting in bad faith.

In support of the argument that the words "bad faith" must appear in a sanctions order, Petitioners have cited *United States v. Stoneberger*, 805 F.2d 1391 (9th Cir. 1986); and *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), which relies on *Stoneberger*. In each of these cases, a sanctions order issued pursuant to the court's inherent powers was vacated where there had been no finding of bad faith by the district court. In *Stoneberger*, the court vacated the sanctions after stating "[o]n the record ... there is no basis on which the [sanctions] can be upheld." *Stoneberger*, 805 F.2d at 1394. Likewise, in *Zambrano*, the court vacated the sanctions order because "mere negligent violation of the [local] rules" could not form the basis for monetary sanctions. *Zambrano*, 885 F.2d at 1480. In both cases the order was vacated because the record did not support a finding of bad faith, rather than because the magic words "bad faith" were missing from the order. Thus, neither *Stoneberger* nor *Zambrano* hold that sanctions cannot be confirmed in the absence of a trial court order explicitly using the words "bad faith," where, as here, a party is specifically advised of conduct that is the essence of bad faith, such as misrepresentation and deceit, thus providing a record that unquestionably supports a finding of bad faith. Accordingly, Petitioners have shown no conflict among the courts of appeals. Indeed, there is none.

B. Particularized Notice of the Sanctioning Authority Is Satisfied Where a District Court Provides Notice of the Objectionable Conduct and Reasonably Conveys Its Belief That the Conduct Constitutes Bad Faith.

As a general rule, a district court must specify the sanctioning authority and the objectionable conduct when imposing sanctions. The particularized notice requirement is satisfied, however, where a sanctioned party was on notice of the objectionable conduct, and was reasonably apprised that the court perceived the specified conduct to constitute bad faith. *See Foster v. Mydas Assocs., Inc.*, 943 F.2d 139 (1st Cir. 1991) (an "unmistakable implication" will suffice).

The view that an implication will suffice is in harmony with the purpose of the rule requiring particularized notice, which is to put "a party on notice as to the particular factors that he must address if he is to avoid sanctions." *Fellheimer, Eichen & Braverman v. Charter Techn., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995) (*citing Jones*, 899 F.2d at 1357).

In *Fellheimer*,[7] the bankruptcy court which imposed the sanctions never indicated that it was acting pursuant to its inherent powers. On appeal from the bankruptcy court, the district court raised this as the legal authority for the sanctions. Although the sanctioning authority was not expressly recited by the bankruptcy court, the Third Circuit held that particularized notice had been given where the record indicated that the attorney was on notice of the objectionable conduct, and the court's belief that it evidenced bad faith.

As in *Fellheimer*, Petitioner Klayman was more than sufficiently made aware of the conduct the court considered to be sanctionable. That his "misrepresentations," cited by the court, were considered bad faith were inescapably clear. As the Federal Circuit found, the "order made clear" that Judge Keller considered Petitioners' conduct, "particularly by making certain misrepresentations to the court", to constitute bad faith. This is true as well of Petitioners' continuous refusal to follow court orders. Having provided notice sufficient to satisfy the purpose behind the particularized notice requirement, the imposition of sanctions by the district court was proper, as was their affirmance by the Federal Circuit.

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[7] See discussion, *supra.*, at pp. 17-18, and p. 21.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A - JUNE 30, 1992 ORDER REGARDING PRO HAC VICE STATUS OF ATTORNEY LARRY KLAYMAN

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP., et al.

Defendants.

ORDER

As the result of misconduct both before and during trial, this Court sua sponte raises the issue of attorney Larry Klayman's pro hac vice status.

Appearing pro hac vice is not a right guaranteed by statute or the Constitution. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). It is instead a privilege and an accommodation accorded out-of-state counsel. *See* Local Rule 2.2.3.1 (permitting "in the discretion of the Court" an attorney not otherwise eligible to practice before Court to do so in a pro hac vice capacity).

In the early stages of the present case, Mr. Klayman applied to appear pro hac vice pursuant to Local Rule 2.3.2. This Court exercised its discretion and granted him permission to make such an appearance. This Court now, after an extensive trial, elects to exercise its discretion to preclude Mr. Klayman from practicing before it again in a pro hac vice capacity. This conclusion is based upon a pattern of misconduct, including he following incidents:

1. On numerous occasions, Mr. Klayman failed to follow explicit Court orders. This disobedience included but was not

limited to his failure to file requested pleadings and documentation in a timely fashion; his continued use of "speaking objections" despite the Court's repeated admonitions to cease such interruptions; his refusal to directly answer the Court's questions; and his insistence on making further argumentation when he had been ordered by the Court to cease speaking. All of these actions considerably delayed a prompt adjudication of this matter.

2. Mr. Klayman represented that he required a continuance of the trial date to obtain the presence of his client, Mr. Frank Su, a resident of Taiwan. Based upon this representation, a continuance was granted. When trial commenced on the continued date, Mr. Su was not present in court despite a representation by Mr. Klayman that he was in Los Angeles and conducting his business. The Court perceives this as being completely inconsistent with his representation as to the necessity of a continuance. In fact, Mr. Su did not appear in court until the second week of trial.

3. Mr. Klayman represented to the Court that a particular piece of evidence, the Sepco catalog, had not been produced during discovery because it was "after discovered" evidence. This representation was directly contradicted by the testimony of his own client, Mr. Carter, who stated that he had made counsel aware of the catalog well before the close of discovery. The Court believes this misrepresentation was, at the least, negligent.

4. During the course of trial, Mr. Klayman represented to the Court that a patent issued to a company by the name of Eurotech existed which was quite similar to the patents at issue in the suit. The Court ordered him to produce evidence of such a patent and he failed to do so. Opposing counsel subsequently produced an earlier letter from Mr. Klayman's office indicating that no evidence existed of a Eurotech patent.

5. Mr. Klayman failed to represent his client in a timely fashion. He made an untimely jury demand and, despite notice from the plaintiff's counsel, did not comply with 15 U.S.C. § 282 which requires that prior art in a patent case be identified 30 days prior to trial.

6. Mr. Klayman did not comply with several discovery requests propounded by opposing counsel, who in turn were forced

to secure Orders to Compel from the Magistrate. Mr. Klayman only partially complied with those orders.

7. Finally, Mr. Klayman represented to the Court that he had never been sanctioned or denied pro hac vice privileges in any other court. This Court's review of the pleading in a related libel case reveals that Mr. Klayman was sanctioned on at least one other occasion for misconduct under both 28 U.S.C. § 1927 and Fed. R. Civ. P. 11. *Klayman & Gurley, P.C. v. Peter Scott*, 1989 U.S. Dist. LEXIS 13638 (D.D.C. November 15, 1989).

This Order is prospective in nature. Any future application to practice pro hac vice before this judge will be DENIED. In addition, Mr. Klayman is ORDERED to attach a copy of this Order to any future pro hac vice applications in this District.

IT IS SO ORDERED.

/s/
William D. Keller, Judge
United States District Court

Dated: June 30, 1992

APPENDIX B - ORDER GRANTING MOTION TO STAY PRO HAC VICE ORDER AND GRANTING EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

CIVIL MINUTES - GENERAL

Judge William D. Keller July 17, 1992

Before the Court is defense counsel's motion for a stay of this Court's June 30, 1992 Order regarding the pro hac vice status of Larry Klayman. Defense counsel indicates that he intends to retain counsel to seek reconsideration of this order. The motion is GRANTED. The Court's June 30, 1992 Order is ORDERED put under seal until the Court directs otherwise. Defense counsel shall file his motion for reconsideration within thirty (30) days of the date of this Order at which time the Court will take the matter under submission. No extensions of time will be granted.

IT IS SO ORDERED.

APPENDIX C - ORDER DENYING MOTION FOR RECONSIDERATION OF PRO HAC VICE SANCTIONS

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

CIVIL MINUTES - GENERAL

Judge William D. Keller August 21, 1992

Before the Court is defense counsel's motion for reconsideration of the Court's June 30, 1992 Order. After full review of defense counsels submission, including Mr. Larry Klayman's declaration, this Court finds that the motion is without merit. Accordingly, the motion is DENIED. The Clerk of the Court is ORDERED to unseal this Court's June 30, 1992 Order.

IT IS SO ORDERED.

APPENDIX D - EXCERPTS OF TRIAL TRANSCRIPT CONTAINING JUDGE KELLER'S DENIAL OF THE ORAL MOTION FOR RECUSAL

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

pp. 1584-1605

Next issue, defendants have moved for the court to recuse itself form this case. The legal standard regarding refusal is set forth in Title 28 Section 455(a) and it is required, quote, only if the bias or prejudice stems from an extrajudicial source and not from the conduct or rulings made during the course of the proceedings, end quotes. *Toth v. Trans World Airlines*, 862 F.2d, 1381 and 1388, Ninth Circuit 1988.

The test for disqualification under section 455(a) is an objective one whether a reasonable person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned. In that regarding see *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 at 871 Ninth Circuit 1971.

In their motion the defendants identify only one extrajudicial source upon which a refusal motion could be based. Namely the court's past interest in Masco Corp. The court has previously

addressed this issue after making full disclosure of the relevant facts. Accordingly defendants motion for refusal under section 28 U.S.C. 455(a) is denied.

Now, what counsel is really about here is alleging that over and above a refusal as indicated in section 455(a) or (b) as the case may be, that the court has engaged in misconduct. That is what you are saying. There is a case that is entitled *Pau v. Yosemite Park and Curry Company* 928 F.2d 880, Ninth Circuit 1991, hadn't previously been cited to me. At page 885 they address the segue, if you will, between disqualification or recusal under 455 and judicial misconduct. And they say in part at 885, I am going to read a good portion of the section. In says:

The Paus cannot sustain that burden here, that is the recusal burden under 455(a). All of their allegations relate to incidents during the course of the proceedings. And recusal under section 455 is required, quote, only if the bias or prejudice stems from an extrajudicial source and not from the conduct or rulings made during the course of the proceedings end quotes, citing the Toth case which I earlier cited on the record. Even if we were to review the Paus recusal claim as a charge of judicial misconduct their appeal on this point is meritless.

Let me say this, that I can't rule on judicial misconduct. I can rule on recusal, but I can't rule on judicial misconduct and I am well aware of that. However, not having had judicial misconduct charged against me in seven and a half years, I think it is a good idea to address what you are saying.

Continuing with the opinion, quote, litigants are entitled to a judge who is detached, fair and impartial, closed quotes. *Shad v. Dean Witter Reynolds, Inc.* 799 F.2d 525 531, Ninth Circuit 1986, stated for reversal on the basis of judicial misconduct in a civil trial is nevertheless quite high. Now, I will pause for a second and say to you, listen to this and see if its sounds familiar, comments by the judge require reversal if the judge expresses his opinion on an ultimate issue of fact in front of the jury or argues for one of the parties. Reversal, and I stress this, this is what I am looking for, reversal will not be required where the judge emphasizes evidence, nor where the judge expresses skepticism, provided that the witness

has an opportunity to respond. Parenthetically, obviously a chance to respond, closed parenthetical.

Continuing, cutting comments to counsel, and I don't acknowledge that here, any comment I made here was more than warranted and I believe under the totality of the circumstances that I have acted in a very restrained fashion and I believe in many courts you would have been held in contempt for what went on the other day when you continually interrupted when I told you to be quiet.

Continuing, cutting comments to counsel, particularly those related to skill, rather than good faith or integrity will not generally mandate reversal.

Now, that is the analysis that applies to this case, albeit not identified by Mr. Klayman. In other words you didn't parse it and I might add that this is reflective of the totality of the conduct in this case. I will parse it and I have parsed it.

Now, let's talk about you complaints, and Mr. Klayman, let me say to you that most assuredly, under the law, you are required to vigorously represent you client and if you perceive misconduct, by all means address it. I don't want to in any way impact upon you litigative ardor, all right? Not at all, but your having made comments regarding my prejudgment of the case and/or bias, and this case, if it goes to an Appellate panel, I want them to know what happened from my standpoint.

I have ordered a copy of the transcript which related to your motion to recuse or citing judicial misconduct as I am recasting it in part. And I have sought to identify the complaints which you addressed, and which I repeat, most properly should address. But equally properly I should respond and I am going to respond.

And let me pause for a moment to say this, I don't need to say it, the record will reflect, you were given the absolute every possible opportunity to vigorously defend your client and in no way any motion or conduct or lack thereof on your part impacted your client and it won't. This is not a popularity contest. This is not something where the court makes any decisions based upon legal skill. This is a case where this court must and will and has at all

times made its decision based upon the facts and the law. Now, let's look to what you identified.

Page 1173, questioning Frank Su's honesty. I believe as I recollect what transpired here, that I indicated to you as his counsel, that I did not believe as regard some of his testimony that he was forthright and/or forthcoming. In that regard I reference you to the considerable impeachment that took place and/or the admissions that were made during the course of Mr. Su's deposition. He testified on this witness stand and was directly contradicted on several occasions by what he had said in his deposition.

Furthermore, from a circumstantial evidence standpoint his denial of the lack of knowledge regarding certain individuals, i.e. suppliers, et cetera, did not appear to be entirely credible and he was not forthcoming, seemingly, as regards the relationship that he had with certain of the suppliers and/or others that were involved in this litigation.

Now, it is my role to make a factual determination here of what happened and one, let's put it this way, a principal reason that I identified my concern regarding Mr. Su, without making a final judgment because I haven't heard all the evidence, is it was an attempt to cure the problem, namely my statements were made early on and it was meant to assist. I think that I said to you something to the effect have you ever been to a boxing match, and you said no, but I watched it on television. I said did you ever see somebody give the smelling salts in the corner. I don't remember what your response was but I told you analogously you better give him some salts and tell him that the judge is listening carefully and to be forthright and forthcoming, because for whatever reason the judge doesn't believe you always have been to this juncture.

Now, again, I say to you, Mr. Klayman, I have tried a number of lawsuits. I am to being immodest. I tried a lot of lawsuits. I stood at that very lectern in 1961 and argued an appellate case right here 31 years ago. I have been at it a while and I will tell you as a litigator to receive an input from the trier of fact regarding my client, I then viewed and now view, as very helpful. I don't have to say anything. You are right. But I am not a balls-and-strikes

judge. You are going to get sleeves up and you are going to get a response in this case that is based on the facts, and the facts and the law only and personalities have nothing to do with it. And if you can find anybody who thinks they have had a case tried here decide here based on personality, identify them to me. Let me say this, that is not an empty invitation. You are not going to find that.

Now, for the reasons stated, my observations regarding Mr. Su were, in my view, entirely proper, and I repeat, there was no final decision. I have not heard all his testimony. I still haven't heard all his testimony.

Number two, referring to Richard Carter and his ilk, page 1173 or the transcript, I will give you an impression of Carter. He doesn't seem to be here this morning. Carter is an intelligent man. Carter knows this industry. You didn't load his gun very well because you don't back him up with catalogues and items that were in the marketplace. So what you do is you lean totally on his credibility to this point, I stress that, to this point. But is he credible? Is he knowledgeable? Of course he is. And I don't believe that if I said Richard Carter and his ilk, number one, I don't recall it, but if I said it, it was people in a like situation, all right? There was nothing meant in a negative tone regarding Carter and I don't have that feeling.

Number three, ordering Frank Su back to court but not Anthony Sturrus, Mr. Sturrus, for the record, has been present in this courtroom for the great majority of this trial. It would exceed 90 percent of the trial, more like about 98 percent of the trial. My impression was that Mr. Sturrus would be here for the duration of the trial and my impression of Mr. Sturrus was that he was versed in the American legal system and that he wold indeed be responsive.

In contrast, Mr. Frank Su, he doesn't know the system as far as I can tell. I am going to get to this operation that you complained about also, but he doesn't know the system and we delayed trial in this case for a day or two, I lost a day or two because at the last moment you said look it, I need more time. I gave it to you, I gave you more time. Not exactly indicative of

any type of prejudice or animus on my part. I gave you more time, so he could get here. And what happens? We start the case and there is no Mr. Su. Delay the case, judge. Please. I want to get Su here.

We are in this case, my recollection is, at least a day and probably two and he is not here. Now aside from the forensics associated with that, I made an inquiry to you to my recollection and I said where is Mr. Su? Or words to that effect. And you said to me that he was about is business within the community and would be here at the appropriate time. Not exactly consistent with asking for that continuance of a couple of days, all right?

Now, under the circumstances and given the, this seems to me that it was entirely appropriate for me to impress upon Mr. Su that he was not to go about his business the next day, that he indeed was ordered to return. Now, ordering him the return under those circumstances, as a matter of fact any circumstances, but those circumstances, is totally appropriate and under no circumstances is indicating nay bias, prejudice, animus, et cetera and to suggest otherwise is to totally torture what happened.

Next, number four, commenting that defense counsel better watch himself because the court is going to be trying the related liable suit, I believe, I can't recall the actual context, but I do recall the totality of the circumstances. There has been some controversy over the liable suit. I don't know the merits of the liable suit. It has generated considerable animus between the parties, the attorneys, but obviously that is not my concern. I thought and still think that the interests of justice are best served by having one trial court for this entire dispute and it shouldn't be split up, so to speak. I, in effect, volunteered to take the case. I didn't take the case because I am seeking out the respective company of the attorneys. I can assure you that. Far from it. I did it because I thought that the judicial system was best served from a judicial economy standpoint by one judge trying it rather than reacquainting another judge.

Now, I have, from time to time during the course of this lawsuit, disagreed with you as regards the procedures that you have employed or the lack thereof, and also with your objections and

there have been other disagreements that have been put on the record.

I think that this statement that I made arose under those circumstances. And if you understood my statement to believe I will handle the lawsuit, the liable lawsuit and I will take care of you and/or your client, you misunderstood totally what I was saying. I intended to make it clear that you were not going to create an appearance of bias on my part in order to seek a transfer of this case to another court. In no way did I intend to convey that I would try your liable case in an unfair manner. And I have now addressed that issue.

Next, making observations about the helpfulness of plaintiff's witnesses before defense counsel had an opportunity to cross-examine them. I allude again to the Pau case but I don't just depend on the Pau case. Instead I want to reflect back on when that statement took place. It took place, I believe, following the Anders testimony. You will recall that as a preliminary matter I suggested to counsel for the plaintiff that I didn't see any need for expert testimony regarding the proposed testimony of their expert who proved to be Anders. What I was saying was and what I still feel is that upon reflection he was helpful to my understanding of the products.

Now, that isn't a prejudgment. That is an observation that I was wrong. Indeed that testimony assisted me. It doesn't mean that I agree with Mr. Anders. It means he identified for me matters that I wouldn't have otherwise been aware of. It demonstrates perhaps a lack of sophistication on my part, but it doesn't mean that I agree with Anders. He just raises issues that needed to be raised. And it doesn't mean that I wasn't listening to his testimony on cross-examination. It doesn't mean I reached a final decision. I hadn't, and haven't to this juncture. It hasn't, and haven't to this juncture. I hadn't, and haven't to this juncture. It hasn't been tested by all the testimony in the case.

Next, suggesting that Frank Su was not telling the truth regarding his hernia operation on page 1174, I can't recall everything that has transpired in this case, but I do recall that there was some difficulty with compliance on the part of you,

Mr. Klayman, with respect to the local rules. When this case first came before this court we had, as is mandated by the federal rules of civil procedure, a status conference. In that status conference it is my custom and practice not to take names and numbers of the parties and give a trial date. Quite the contrary. I try to undertake a searching status conference in order to identify the issues to see if there is a chance of resolving the case and also to assess the complexity and time that the case will take.

This court, unlike most of the other courts in this building, has roughly 300 civil cases on its docket, 300. Not all of them have the complexity of this case. Some of them are more complex. Some of them have the potential for a more lengthy trial. But in addition to those 300 cases there are the criminal cases that come through and they displace the civil litigants and it is very very difficult to manage a calendar in a metropolitan community such as this, very difficult. It is a wonder to me that the clerk who sits in front of me maintains her mental well-being and she does. I have never seen her get upset. Why, I don't know, but she manages it, be that as it may. Here we are, what happens to criminal cases. I had one case here about a year and a half ago, seven-month trial, three to 500 million dollars laundered by these people down at the jewelry mart, biggest money laundering case in the country, dubious distinction. Lengthiest case in the history of this courthouse, dubious distinction. Complex, I am telling you, you are going to get the mother of all criminal appeal decisions out of this case, it is going to blow your mind it is going to be such a complex decision and you know who had to pass on all those issues before it got there? Me. And I don't know when another case like that is going to come in.

You have been displaced from time to time during this trial by sentencings, by pleas, and it will take place. On top of that we have our cases where people come in for temporary restraining orders, preliminary injunctions. It is an extraordinary busy court. And the federal system is such that it is our ordain that there will be individual calendars. I have got to tell you as an aside I don't know that an individual calendar is all that good an idea, but if you get into a master calendar situation as we have in the state you

don't move cases for obvious reasons. So we are with an individual calendar. That being the case I have to maintain a tight rein on my calendar. And if I don't do it you have got chaos. And you do have chaos in some courts around this land where people don't know how to maintain their calendar.

Now, to go on to the facts in our case, I made a determination early on that this case was going to take a considerable period of time. I had no idea that you people would wrangle over everything and that there would be a failure of compliance with Title 35 which would give further problems, and that there would be discovery problems that had not seemingly been addressed. I didn't know that. This case fortunately is not the norm. This is a very unusual case in that sense. It is an ugly case the way you two sides have been involved in this, very ugly. It is my job to sort it out, I will do it.

But, turning to what happened here, we had the 11th hour, as I recall it, request for continuance. Now mind you, I blocked out the time and it is very very hard to find the time to address a case like this, very hard. Mind you, we had to go through well, you didn't demand a jury, one more problem that had to be addressed so we had to address that problem also. So we get into a situation where we have got a non-jury trial and I have to find the time, very hard, 11th hour we get a request that the case be continued.

Now, in that regard there was a representation that Mr. Su needed to undergo hernia surgery. Now I want to tell you something, Mr. Klayman, I have never had hernia surgery, but about two years I represented the California Hospital Association. And I represented most of the big hospitals in this community and in that regard I was privy to a good deal of medicine. And I know the difference between an elective surgery and an emergency surgery. And I know that nine plus times out of ten a hernia operation is an elective surgery. So when at the 11th hour somebody says I need surgery right away and it is a hernia, I arch a brow. It doesn't make any difference whether it is Frank Su or a criminal defendant. Interestingly, fortuitously, we had a case in here this morning, some people got a ranch in the southern part of

this district, and one of the defendants has asked for a continuance. Judge, I have been diagnosed as perhaps cancer in my breast, and I want a continuance. What did I do? Well, I think you know the answer. I asked for an affidavit from her doctor and if I didn't do that I better hang it up.

What is the name of that case, for the record, Sara?

THE CLERK: United States versus Zebra.

THE COURT: We are dealing with Ms. Zebra, the very same thing happened this morning. I would be engaging in judicial malpractice. I would be a simpleton of the first water if I just bought off on everybody who comes in here and says I need a continuance, I have got an ill client. That doesn't mean you don't have an ill client. But I have to follow up on that particularly given a case of this nature. This is not the one-day variety. So what I did with your client is entirely consistent with what I would do with anybody and it was enhanced, if you will, by the nature of the surgery, i.e., what I normally perceive to be elective surgery.

Next issue that you address, threatening defense counsel with contempt and sanctions. I have been around the criminal justice system as a prosecutor, both as an assistant and as the United States Attorney for eight years and I have represented so-called white collar defendants and I have tried a great many civil cases, many varieties and I have been on the bench seven and one half years and I have never ever seen anything like what you did the other day. I told you at least six times to be quiet and you continued to talk.

Now, I will tell you, Mr. Klayman, that not to punish you, but to maintain the integrity of the system and try the case in an orderly fashion it would have been well within my discretion to hold you in contempt for what you did. Now, if I had this animus that you say I harbor, I would have been looking for that chance, Mr. Klayman, and I would have got you, the way you put it. I didn't do it, Mr. Klayman. Now, I think that is strongly reflective of the court's state of mind, but aside from that, the fact of the matter is that you were indeed scolded and addressed very strongly and properly so.

Next issue, commenting the defense counsel had difficulty reading two pieces of door hardware, page 1174. I don't believe I ever commented on your reading ability and if I did I misspoke. What I commented upon was the fact that you confused the respective products. I don't remember which ones they were now, but you confused them. There isn't any doubt about that in my mind. You confused them. And I did observe that.

Lastly, meeting out, quote, abuse, unquote, on Frank Su and defense counsel. I have alluded to the problem and/or problems that I have had in this case in conducting a trial in a fair way and in a procedurally effective way. They are almost without parallel when it comes to this lawsuit. You have got a 282 problem that you created which generated what you call the abuse. We have spent or we did spend the better part of a day addressing an issue, namely, the 282 problem that had no place being involved in this case, rudimentary practice dictated that you give 282 notice. Interestingly enough that wasn't the end of the 282 problem. It came up again yesterday.

Now, having to go through this did indeed cause me to castigate you. It has no impact on the trial of this case. The fact that you will not respond to a question that I ask on many occasions, and there have been innumerable occasion when I ask you a question and you slide off it like the proverbial artful dodger. You don't give me an answer. I have never had an attorney do what you do in that regard. Did I castigate you for that then? Yes. Do I castigate you now? Yes. You are supposed to answer the court's question and you don't do it a lot of the time.

Next, your objections, to my way of thinking, on many occasions are speaking objections to educate your witness, number one, and/or number two, improper objections with no legal basis, obviously no legal basis. You have done that with such repetition that I have addressed that issue. If that is your idea of abuse, then so be it. It is my idea that I need to communicate to you that I think you are incorrect.

I have addressed each and every one of the matters that you have, at least I have attempted to that you have raised and if

you want to give me any further input do it in writing. There will be no further argument on it.

I will not recuse myself because of the Masco situation. I made it abundantly clear that I had no idea Masco was involved and you seemingly indicated it was proper until you thought things were perhaps moving in the wrong way for you. I believe, irrespective of your view. that this court can properly try this case because at all times in issue here, I had absolutely no interest and I don't even know that the interest I had in the first place was such to cause a refusal quite frankly. And I still don't make any rulings at all on this case until well after the sale of that stock.

APPENDIX E - EXCERPTS FROM TRIAL TRANSCRIPT CONTAINING JUDGE KELLER'S SUA SPONTE PROPOSAL FOR PRO HAC VICE SANCTIONS

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

pp. 109-116

THE COURT: I am not going to award attorneys fees in that regard.

Now, pro hac vice. Let me cite you to 2.2.3.1. of the local rules. And I do this all in the context of saying that I have in almost eight years of sitting on the bench and 23 more years being a lawyer, never seen this pro hac vice issue come up before. It is remarkable that this has presented itself the way it has. And I am very loath to get involved with something like this, but I must protect the system. It is so endemic in the presentation of this case that when I put together a checklist of the failings of this counsel, I was appalled.

2.2.3.1 is entitled Permission Pro Hac Vice. It says in part: "Any person who is not otherwise eligible for admission to practice before this court," and I take it you are not admitted in the State of California, Mr. Klayman?

MR. KLAYMAN: No.

THE COURT: "But who is a member in good standing and eligible to practice before the bar of any United States court and who has been retained to appear before this court may upon written application and in the discretion," I stress that, "in the discretion of the Court be permitted," I underscore permitted, "to appear and participate pro hac vice in a particular case."

No this, is a matter of accommodation. And my view that I will let you speak to, Mr. Klayman, is that you seriously violated many of the standards of practice and that you should be precluded henceforth from practicing in my court and that I will issue an order, I can't bar you without referring you to the disciplinary committee, I will issue an order which will set forth your transgressions if you do not convince me to the contrary, which order you must file with the clerk of this court any time you seek to appear in pro hac vice. I want that judge who gets the next case you have coming here to know about you. That judge is going to know that I precluded you, except for this liable case, to ever practice in front of this court again. I have never seen anything like what you have done here.

Now, in no particular order, I have written down the following observations:

Multiple objections without any arguable basis to the facts or law and many that simply did not apply whatsoever to objections, evidentiary objections. The evidentiary competence displayed by you was sorely lacking. Repeatedly you made speaking objections that appeared, in my view, and I am saying for the record not to accredit myself -- I am seeking to accredit myself for anybody who reviews this, but I am not seeking it as, I am not stating it as puffery -- but in my view borne of 31 years of trial practice, and that is all I ever did, I have never been somebody so egregiously violate court rulings as you did here. I told you not to make any more speaking objections. And in my view you were attempting to coach witnesses on several occasions and you continued to do so despite my admonition.

Next, you wouldn't be quiet when I told you to be quiet on more than one occasion. I believe it rose to the level of

contempt, contempt, and I was forced to use my gavel rather than raising my voice. It was gross the way you disobeyed this court when I told you to be quiet and on more than one occasion.

You were singularly unwilling to answer questions that I asked of you as an officer of the Court though I requested and indeed finally was driven to the point of ordering you to answer the question.

You didn't conduct yourself in a timely fashion in this case. The jury demand was late. The 282 demand notice was not made. The answers to requests for admissions were inappropriate and/or untimely.

You didn't obey the court's orders regarding the filing of documents and pleadings during the course of the trial nor to give me the input when I ordered it. Mr. Neuner had to remind me on several occasions. He hadn't complied yet, judge.

Your delay regarding Frank Su, I do not believe was forthcoming. You were doing it for another reason, namely, to serve your purpose to woodshed him and understand further what his position was, but you didn't need that continuance from the standpoint of this court. You should have been prepared to go to trial. You were prepared to go to trial, all alternatively, you weren't prepared to go to trial and under the guise of having to have Frank Su here at trial you got a further continuance which you never should have gotten and if you did have to, you should have said I need to talk to my man, judge. I am not going to have him here. You led me to believe he was going to be here and I think that was, at the very least, a misrepresentation.

Have you ever had any prior problems with any other courts where you have been denied pro hac vice or sanctions?

MR. KLAYMAN: No, Your Honor.

THE COURT: Never, at any time?

MR. KLAYMAN: No.

THE COURT: Eurotech, you represented there was a patent, flat out you represented there was a patent after you studied this case. The plaintiff questioned you on that. You were required to make a filing to satisfy the court that there was a patent. You didn't make the filing. Mr. Neuner called it to my attention and

you stated that you couldn't find it and you were not pursuing the issue. I find that that was either negligent or not in good faith.

Next, you represented that Sepco was late discovered evidence and regarding prior art third-party use. I told you, and I unequivocally stand by this, very clearly, Mr. Carter contradicted you and he said that I told my counsel, he said, he took three approaches, almost immediately, in response to my questions, he took three approaches. He said almost immediately or when I was at a trade show or certainly before close of discovery and you take your choice, he identified those things, and your law firm was aware of this and you never brought it to my attention.

You were requested and/or instructed not to make editorial comments to include references to your clients' financial situations, and to otherwise editorialize. You repeatedly violated that request and/or instruction by this court up to and including today.

And under those circumstances, my provisional finding is, my finding provisionally is this, number one, you will not practice absent the liable suit ever again in my court, as an attorney, number one.

And number two, you must serve on any, I am going to serve a copy of my order on the clerk of this court and the other judges, and whenever you file to apply in the future, it does not account for Judge Rafeedie's case, you may certainly practice there and you do not have to bring this to his attention, but you are advised that -- and any cases that are underway here where you are representing now, this is up to a court to make a determination what it was to do -- but you have to serve a copy of this on all courts before which you are practicing now and if you ever attempt to appear pro hac vice in this district again, you must file with that application a copy of my order that I am proposing, which order is going to preclude you for the various reasons I have identified ever practicing in this court again.

Do you want to be heard?

MR. KLAYMAN: Yes, I do, Your Honor.

Let me just say at the outset, I think that my demeanor in the record will show that I have always been respectfully

towards the court, towards you, towards Mr. Neuner and towards everybody on the other side.

With regard to the other side, with regard to the plaintiff, Your Honor, I have gone through seven weeks of trial being accused of everything. It got to the point where I was even accused of suborning perjury. And at that point, Your Honor prevented me from consulting with my client. There was in effect a, quote, a gag order, during a time when he was being accused of perjury.

Plaintiff's counsel obviously was not ...

APPENDIX F - EXCERPTS FROM TRIAL TRANSCRIPT CONTAINING ORAL MOTION FOR RECUSAL

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

pp. 1171-1177

MR. KLAYMAN: Your Honor, I'd like to make a general motion.

THE COURT: What's that? What's a general motion?

MR. KLAYMAN: May I ask for a recess to make a general motion?

THE COURT: No. You want to make a motion, you can make -- I don't know what you mean by a general motion. I've never heard of a general motion.

MR. KLAYMAN: I have a motion that I wanted to make at the closing of the plaintiff's case, but I feel that it may be more appropriate at this time.

THE COURT: What's the general motion?

MR. KLAYMAN: Should I take the lectern?

THE COURT: You can stand there, sit there, or take the lectern, whatever you want to do.

MR. KLAYMAN: Your Honor, it's only after great consideration that I make this motion. I've given it great thought; I've thought about it and I have -- it's not the kind of thing that makes me happy, and I say it in a grave voice.

I am convinced that I have to make the motion because I am counsel. I've taken an oath to protect my client zealously within the bounds of the law. And the motion is, your Honor, that I ask you to recuse yourself in this case. I know that we're all human. I'm human too. And I feel that sometimes you can prejudge an issue. And I have sat here throughout this case and I have listened to certain things occur. And I would not be doing my job as counsel if I did not make the motion, and the motion is made under 28 U.S.C. 455(A).

THE COURT: I'm familiar with 28 U.S.C. 455(A).

MR. KLAYMAN: And allow me to enumerate some of the bases for that, your Honor:

I believe, and I've made a record and I don't want to belabor the point here, because my intention is not to be abrasive; my intention is not to do anything other than my job.

But I sat here and I've listened to comments that have reflected that my client is not telling the truth, that you referred to -- and when I questioned that, your Honor, that statement, your Honor disagreed with it and pointed out that this was not true. I got a very strong reaction.

You've referred to Richard Carter, one of my clients, as a Richard Carter and his ilk. In addition to questioning my client's honesty, you have ordered him back to the witness stand, and I felt it was ordered in a very strong and negative way, and I questioned that, and I pointed out that you didn't do that with Mr. Sturrus. And you raised the issue that you treat everybody the same regardless of national origin. Your Honor, that was a non sequitur in that context.

You've made comments that, Mr. Klayman, to the effect that you'd better watch yourself here, because I'm going to be trying the libel suit. The libel suit doesn't have anything to do with this case.

You've made comments about the plaintiff's witnesses before I had the opportunity to cross-examiner those witnesses in terms of their extreme helpfulness towards the case; and it was at that point that, in my view, sitting here, made you explode. I'm not concerned with your approach towards me. I am concerned about it toward the client, however.

You early on during this proceeding questioned and suggested that Mr. Su is not telling the truth when he had hernia operation and could not be here.

We submitted medical evidence and letters from Mr. Su stating that, in fact, he did need that operation and, in fact, we also submitted letters and documentation showing that he wanted to go to trial. I released some attorney-client information that he'd sent to me saying he was anxious to go to trial, yet you questioned whether he wanted to be in trial and you made remarks in this case about him not showing up the first time, and that's why you ordered him back to the stand.

You have threatened me with contempt and sanctions. I think the record is clear that I am tying to do my job, your Honor. I have not been in any way negative towards either you or opposing counsel.

You have cut me off virtually at every opportunity to give an objection and to explain it. And I've started to ask if I could have permission to explain, because I want to have an orderly proceeding, and you cut me off from that, too.

You made comments about a problem I had reading an exhibit, suggesting that the fact that I couldn't read exhibits on two pieces of door hardware suggested confusion in the case.

THE COURT: The confusion that was replicated with Mr. Su on the stand today when he said he identified the product -- I have a note on that. Yes, I did make that observation.

(Brief pause)

Exhibit 16. The witness stated that the product was his, unequivocally. Mr. Neuner, quite frankly, asked another question and got an answer, "well, I don't know." When he has an answer: "It is my product."

So then, to reinforce it, "That's your product?"

"Oh, well, I'm looking at it closely now; no, I don't think it's my product."

That's exactly what happen in here. Okay?

MR. KLAYMAN: Your Honor --

THE COURT: And I want to say that you must, of course, make your record, Mr. Klayman. But I can't help but observe that the mistake that he made today was a mistake that you made earlier in this proceeding.

Please continue with your observations and/or objections.

MR. KLAYMAN: Your Honor, there is no record that anything other than the fact that this man has been under a lot of pressure -- he's been testifying for a long time. I did not take the advantage that you took of him. But this is another indication that you have prejudged the case.

And your Honor, I sat here for two days, and whatever the case may be in terms of how you perceive our client and myself, we took a tremendous amount of what I perceive to be abuse -- layered on top of the fact that admittedly at some point in this case you had a prospective interest, potential interest in Masco.

I have to say, your Honor, that the standard here is whether -- and there's a case, Fawn versus American Air Lines, 431 1334, Northern District of California, 1977.

THE COURT: What judge is it?

MR. KLAYMAN: I don;t have the name of this judge, your Honor. It's one of a number of similar cases, wherein it states: The charge of lack of impartiality must be grounded on facts which would create a reasonable doubt concerning the judge's impartiality. Not in the mind of the judge or even necessarily in the mind of the litigant, but rather in the mind of a reasonable person.

And sometimes, your Honor, when you yourself are involved -- I mean you plural, not you, your Honor -- it's hard to see what may be occurring. The standard here is the reasonable person, your Honor. And I submit, and I submit strongly, and I'm not in any way happy about this. I think if anybody sees my demeanor here, I'm shaking a little bit because I've never done this before. But I firmly believe, and I'm sure that the record will

reflect that this is that case where indeed prejudgment has occurred, and I ask you, your Honor, as a man of integrity, to recuse yourself of this case.

THE COURT: Your motion has been made, Mr. Klayman, and my observation in this bench trial have been shared with you as trier of fact. And as I think I said at the time in issue, I as an advocate for my client was always most interested in how the trier of fact was responding.

I've given you an opportunity to respond from time to time, and I feel I've done so properly. I was critical and I am critical of the manner in which you've conducted this litigation. You are in no way redounded to the detriment of your client. But you didn't procedurally even come close to obeying the rules that are applicable to this case.

I came to a very, very significant part of your case. I want you to know that the hearing that took place that lasted hours should have been totally unnecessary, and indeed I was critical of you then. And I shared that criticism with you because I don't want to encourage any further improprieties from the procedural standpoint on your part. And what begot your statement just now as yet ...

APPENDIX G - MEMORANDUM IN SUPPORT OF MOTION TO STAY PRO HAC VICE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

MEMORANDUM IN SUPPORT OF EXPEDITED MOTION FOR STAY OF ORDER RE: PRO HAC VICE STATUS OF LARRY KLAYMAN

I. INTRODUCTION.

On June 30, 1992, the Honorable William Keller issued an order sanctioning attorney Larry Klayman for claimed misconduct before and during the above-styled proceeding. For the reasons set forth to the court, orally and in writing, at the close of the trial on June 24, 1992, Larry Klayman submits that he committed no misconduct. Accordingly, he had asked the court to reverse its proposed findings both with regard to the 28 U.S.C. 1927 and pro hac vice issues. Attorney Klayman respectfully requested this reversal, not only because he committed no misconduct, but also because the Court's findings would negatively impact on his professional reputation, as well as ability to effectively represent on-going client interests in the proceedings before the U.S. District Court for the Central District of California. Attorney Klayman submits that he currently has a good reputation in the professional

and lay communities. (Exhibit 1). However, on June 30, 1992, the court issued the subject order in any event.

This order, which has been filed in the court's "public file", and which the court ordered be attached to any future *pro hac vice* application, is severe in its intent and content. it will likely be reported throughout the legal system and used by legal adversaries of Attorney Klayman's clients in other proceedings.

II. DISCUSSION.

Because of its severity, and likely negative impact, Attorney Klayman has decided to retain counsel to argue for its reconsideration and any other appropriate remedy. For this reason, Attorney Klayman respectfully asks the court to stay enforcement, for 60 days, of its order of June 30, 1992, to allow him to retain suitable counsel to review the entire proceeding -- including the court transcript -- and in order to move for reconsideration and take whatever remedial action is deemed appropriate.

III. CONCLUSION.

Out of fairness and equity, Attorney Klayman respectfully asks the Court to stay enforcement of its order for 60 days to allow sufficient time for him to retain counsel and review the court file and transcript, move for reconsideration, and take whatever remedial action is deemed appropriate. A stay of 60 days will not work prejudice to any party, as Attorney Klayman does not plan to, and will not, apply for pro hac vice entry into this District during that period.

To avoid prejudice to Attorney Klayman, it is respectfully requested that the Court's June 30, 1992, order be filed under seal pending the expiration of the 60-day period.

DATED: July 14, 1992 Respectfully submitted,

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APPENDIX H - MOTION FOR ADDITIONAL EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION OF PRO HAC VICE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

EX PARTE APPLICATION REQUESTING (1) ADDITIONAL TIME TO FILE BRIEF AS DIRECTED BY COURT ORDER OF JULY 17, 1992 AND (2) THAT MOTION FOR RECONSIDERATION BE FILED UNDER SEAL; MEMORANDUM OF POINTS AND AUTHORITIES; and DECLARATIONS IN SUPPORT THEREOF

Larry Klayman ("Klayman") hereby applies through counsel *ex parte* for an extension of time within which to respond to the Court's Order of June 30, 1992 ("Order") directing Klayman to file a motion for reconsideration of the June 30 Order on or before August 16. Under the Federal Rules of Civil Procedure, Rule 4 and the local rules of this Court, Klayman's response would be due not later than August 17, 1992. Klayman has attempted to secure copies of the transcript of proceedings of June 22 and June 24, 1992 which are highly pertinent if not indispensable to his ability to respond to the Court's Order and the absence of which will be prejudicial to Klayman's effort to respond.

Klayman also seeks an order directing that the motion for reconsideration and all related papers be filed and hold under seal pending the Court's decision.

This application is based on this application, the attached memorandum of points and authorities and declarations of Timothy J. Harris and Patti Lavine and is made pursuant to Local Rule 7.18.

DATED: August 12, 1992 CHARLSTON, REVICH & WILLIAMS
TIMOTHY J. HARRIS
ROBERT D. HOFFMAN

By:_____
Timothy J. Harris
Attorneys for Respondent
Larry Klayman

MEMORANDUM OF POINTS AND AUTHORITIES

COUNSEL OF RECORD FOR OTHER PARTIES

Plaintiffs counsel is Robert Neuner of Brumbaugh, Graves Donohue & Raymond (212) 408-2560. Our efforts to reach Mr. Neuner have been unsuccessful. Defendants counsel is Mr. Larry Klayman of Klayman & Associates, P.C. (202) 646-5160. Mr. Klayman as no objection to this application.

FACTS

From May 7, 1992 through June 24, 1992, the firm of Klayman & Associates, P.C., through Larry Klayman, appeared as counsel for defendant FrankSu Enterprise Corporation, FrankSu and Decorators Accessories, Ltd. in that certain civil matter entitled "*Baldwin Hardware Corporation v. FrankSu Enterprises Corporation, et al.*" Civil Action No. 904919 WDK (Bx) pending in United States District Court in the Central District of California. The patent and trademark case was tried before the Honorable William D. Keller.

At the close of trial, Judge Keller advised Mr. Klayman that any further application to practice *pro hac vice* before Judge Keller would be denied and directed Mr. Keller to attach a copy of the Court's order to any future *pro hac vice* in the Central District of California.

The Court issued its order on June 30, 1992. On July 17, 1992, the Court granted Mr. Klayman's motion for a stay of the June 30 Order and placed the June 30 order under seal pending further decision of the Court. The Court directed Mr. Klayman to file a motion for reconsideration of the June 30 order within thirty days of the July 17 order and stated that "no extension of time will be granted."

Pursuant to Rule 4 of the Federal Rules of Civil Procedure, the motion for reconsideration must be filed on or before August 17, 1992.

I. COUNSEL IS UNABLE TO EVALUATE THE NEED FOR AND OBTAIN PORTIONS OF THE TRANSCRIPTS IN TIME TO COMPLY WITH THE AUGUST 17 ORDER

Mr. Klayman and the undersigned counsel believe that portions of the trial transcript are indispensable to Mr. Klayman's motion for reconsideration. Unfortunately, the transcript portions cannot be obtained in time (despite good faith and diligent efforts to do so) to evaluate and file with the motion an August 17. This *ex parte* application requests the Court to continue the time for filing the notion from August 17 until September 17.

On approximately June 24, Mr. Klayman requested from court reporter Ms. Lois Anderson, a quotation concerning the cost of obtaining complete copies of the Court's proceedings on the afternoon of June 22 and June 24, 1992. Mr. Klayman did not receive a response and then telecopied a letter on August 3, 1992 to Ms. Anderson at a facsimile number provided to him by the Court. Mr. Klayman received no response to the telecopied letter.

Mr. Klayman retained counsel for the purpose of responding to the Court's June 30 Order on August 6, 1992, Counsel made further inquiry of the court clerk. Counsel's secretary was advised that Ms. Anderson had been ill and had not received Mr. Klayman's letter of August 3 (Lavine Decl.) Not until Monday, August 10, 1992 did counsel for Mr. Klayman receive a telephone call from Ms. Anderson, who had been out of town. (Harris decl, ¶4) Ms. Anderson has advised that the portion of the transcript we initially requested, the afternoon of June 24, can be ready by noon on August 12. Counsel does not believe that this will allow sufficient time to analyze this portion of the transcript. Moreover, Counsel believes that further transcript references may be needed and that insufficient time is available to identify and secure them from the Reporter before August 17.

Counsel has requested access to transcript copies that were reportedly obtained by plaintiffs (Harris decl., ¶3) but not response to this request has been received.

Under the circumstances, counsel has been unable to obtain, despite due diligence, a copy of proceedings at trial which are pertinent to the motion for reconsideration since they will provide counsel with the Court's official record of what was said by the court as well as by Mr. Klayman and which Mr. Klayman seeks to include in his motion for reconsideration.

Since it would be neither fair nor appropriate to require Mr. Klayman to respond to the Court's June 30 order without an opportunity to review the actual transcript of proceedings pertinent to the Court's order, Mr. Klayman hereby requests a further continuance of thirty days in order to allow the court reporter to complete the transcription requested and include it in the motion for reconsideration as is appropriate.

II. CONFIDENTIALITY OF THE MOTION AND RELATED PAPERS

The Court's July 17 order directed that the June 30 Order be held under seal. To assume that the purpose of the July 17 Order is not defeated, Klayman requests that the Court order that the motion for reconsideration and all related papers also be filed under seal and be kept confidential by the parties and their counsel pending the Court's decision on the motion for reconsideration.

DATED: August 12, 1992

CHARLSTON, REVICH & WILLIAMS
TIMOTHY J. HARRIS
ROBERT D. HOFFMAN

By:_____
Timothy J. Harris
Attorneys for Respondent
Larry Klayman

APPENDIX I - MOTION FOR RECONSIDERATION OF PRO HAC VICE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND ORDER THAT *PRO HAC VICE* AND 18 U.S.C. 1927 PLEADINGS AND ORDERS BE PLACED OR REMAIN UNDER SEAL AND BE DEEMED CONFIDENTIAL, PENDING DISPOSITION OF APPEAL; DECLARATION OF LARRY KLAYMAN IN SUPPORT THEREOF

I. INTRODUCTION.

Respondent, Larry Klayman, previously moved this Court for an order placing its June 30, 1992 *pro hac vice* order under seal, as well as providing 60 days to move for reconsideration of this order. On July 17, 1992, the Court granted the motion placing the June 30, 1992 *pro hac vice* order under seal, but granted only 30 days to file a motion for reconsideration. Attorney Klayman had requested 60 days to obtain authorization from his firm's professional liability carrier to retain counsel on his behalf; to review the extensive trial record, and for counsel to then prepare and file a motion for reconsideration on his behalf. Moreover, a

60 day period was required to identify and obtain relevant portions of the trial transcript -- which excerpts were absolutely required to move for reconsideration. Unlike plaintiff, Baldwin Hardware Corporation, neither Attorney Klayman nor his clients had ordered a daily copy of the entire transcript during trial, because of their inability to pay for it. When Attorney Klayman and defendants have requested access to plaintiff's trial transcript, these requests were steadfastly refused.

On August 13, 1992, counsel for Attorney Klayman -- which had been appointed by the professional liability carrier only on August 6, 1992 -- moved for a 30 day extension to prepare and file a motion for reconsideration. This extension, if granted, would have provided the initially estimated and requested 60 days to file the motion. The primary reason for the request was to provide time to obtain copies of relevant portions of the trial transcript, which had not proven possible due to the apparent unavailability of the Court Reporter during the intervening time period.

On August 14, 1992, one working day before the motion for reconsideration was due under the Order of July 17, 1992, the Court denied Attorney Klayman's *ex parte* application for a 30-day extension of time.

II. DISCUSSION

Without the additional 30-day extension of time, attorney Klayman and his counsel do not have the means to prepare a motion for reconsideration based on specific reference to the entire trial record. Accordingly, in order to prepare his challenge to the Court's *pro hac vice* Order of June 30, 1992, with as much specificity as possible, by making specific reference to relevant portions of the Court transcript, Attorney Klayman respectfully requests that the Court reconsider its June 30 Order based upon the attached declaration of Larry Klayman. Upon reconsideration, it is requested that the Court order as final, its Order of June 30, 1992 as reconsidered, so that Respondent may take a timely appeal to the higher court. In addition, to avoid further injury to his reputation and his client interests, Attorney Klayman respectfully requests that all pleadings referring or relating the Court's

pro hac vice order of June 30, 1992, be ordered placed and kept under seal, as well as designated as confidential under the parties' protective order. (See Attorney Klayman's Motion for Order to Show Cause). As the issues related to plaintiff's 18 U.S.C. 1927 motion, and the Court's *pro hac vice* sanctions are related if not identical, Attorney Klayman respectfully requests that these pleadings be accorded similar treatment. As set forth in Attorney Klayman's Motion for Order to Show Cause, filed on July 24, 1992, plaintiff as well as opposing counsel in another case (*Jepson, Inc., et al. v. Makita USA, Inc., et al.*, No. 90-4312 ER (GHKx) (C.D. Ca.)) have already sought to severely harm Attorney Klayman by publishing these sanction orders and pleadings to both Judge Rafeedie and the public. To allow Attorney Klayman an opportunity to protect his important professional and client interests, without risk of further harm, it is only fair and just that these sanction orders and pleadings be placed and kept under seal, and ordered to be kept confidential by the parties, pending the disposition of appeals to the higher court.

III. CONCLUSION

For all these reasons, Attorney Klayman respectfully that his motion be granted.

DATED: August 17, 1992 Respectfully submitted,

By:_____

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Supreme Court, U.S.
FILED
OCT 3 1996
CLERK

(3)

No. 96-287

In The
Supreme Court of the United States
October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,
Petitioners,

v.

BALDWIN HARDWARE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Larry Klayman is the proprietor of Petitioner Klayman & Associates, P.C., a small law firm that has generally included himself and two (2) other attorneys. In approximately 1990, Petitioners agreed to represent Franksu Enterprise Corp., ("Franksu"), a Taiwanese manufacturer of bathroom accessories, and Decorators Accessories, Ltd. ("Decorax"), Franksu's U.S. importer, after they were named as defendants in a patent and trademark suit brought by Respondent Baldwin Hardware Corporation in the U.S. District Court for the Central District of California ("the Central District"). Because Petitioners believed Franksu and Decorax had a meritorious defense, but had been singled out unfairly by Baldwin, they agreed to represent defendants on a reduced fee basis, charging only $75 per hour rather than Petitioners' customary fee.

It is widely known that the U.S. bathroom accessory industry is dominated by Jewish entrepreneurs, including Mr. Richard Carter of Decorax. Early into the trial, the trial judge made several comments that Petitioners perceived to demonstrate extra-judicial bias and prejudice. Specifically, the trial judge repeatedly made derogatory references to people of Taiwanese and Asian descent, such as Franksu's owner, Mr. Frank Su, mockingly mispronounced the last name of a Jewish witness, and referred to the Jewish owner of Decorax as "Mr. Carter and his ilk," among other serious indicia of extra-judicial bias and prejudice. It also became known that the trial judge had held stock in Respondent's parent company during early but significant parts of the case. Consequently, Petitioners were asked by their clients to move for the trial judge's recusal, not so much to force the trial judge to recuse himself (an unlikely result given his past history, *see Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989); *see also U.S. v. Hobbs*, 991 F.2d 569 (9th Cir. 1993)), but to sensitize him, and hopefully insulate defendants from this apparent bias and prejudice.

Pursuant to their client's request, Petitioners orally moved the trial judge to recuse himself, setting forth their clients' concerns

diplomatically to avoid inciting him. *See* Appendix G. Not surprisingly, the trial judge denied the motion for recusal.

However, after denying the motion, the trial judge turned his wrath from Petitioners' clients to Petitioners themselves. The trial judge proceeded to brow beat counsel for the rest of the seven (7) week long trial. Specifically, he put a gag order on Petitioners's objections, threatened Petitioners with contempt, and even accused Petitioners of suborning perjury, among other unfounded accusations. Seizing on the trial judge's conduct, Respondent opportunistically advised the trial judge that it would file a motion for sanctions under 28 U.S.C. § 1927. The trial judge stated that he would address the issue of sanctions at the end of trial, but later said he was not inclined to sanction Petitioners under § 1927. *See* Appendix H at App. 11. As a result, Petitioners did not expect to be sanctioned at the close of the trial.

At the end of the trial, on July 24, 1992, the trial judge sprang upon Petitioners, *sua sponte*, an Order that even the trial judge admitted was intended to effectively prohibit Petitioner Klayman from ever appearing *pro hac vice* before the Central District of California again, save for one on-going case. *See* Respondent's Brief in Opposition ("Opp.") at A.19. After announcing his Order from the bench, the trial judge then gratuitously asked Petitioners if they wanted to respond. Petitioners did so. *See* Appendix H. On July 30, 1992, the trial judge predictably entered a written Order reflecting his previous, oral findings.

After Petitioners were sanctioned, they considered asking for a reconsideration of this Order, as well as of an award of attorneys fees entered against them on August 25, 1992 under 28 U.S.C. § 1927. Accordingly, Petitioners ordered a limited part of trial transcript -- that portion which concerned the *pro hac vice* Order and Petitioners' response. Ultimately however, Petitioners decided against filing a motion for reconsideration when their professional liability carrier and its counsel informed them that the sanctions orders were not covered by liability insurance and that, for strategic reasons, it would be better to simply file an appeal instead, especially as it was unlikely that the trial judge would reverse

himself. Petitioners thus took appeal from not only the *pro hac vice* Order, but from the § 1927 Order as well. Respondent cross-appealed, claiming that the trial judge should have awarded larger sanctions.

While Respondent received a daily transcript during the trial, it refused to make this transcript available to Petitioners. Respondents also represented that the transcript had cost in excess of $27,000. Due to the devastating impact that the seven (7) week trial had on Petitioners' financial situation, their professional liability carrier's decision not to reimburse them for the transcript and, ultimately to decline coverage and a defense, Petitioners could not afford to purchase the entire transcript themselves, nor could their clients. Consequently, Petitioners sought to obtain the transcript *in forma pauperis*. The same trial judge who had sanctioned Petitioners, denied their request for *in forma pauperis* treatment.

Petitioners then asked the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") to obtain the transcript. The Federal Circuit initially denied this request, but stated that it could ultimately be decided by the merits panel. After demonstrating that the self-serving, cropped portions of the transcript provided by Respondent for its cross-appeal were insufficient and grossly distortive of the trial record, Petitioners argued that the transcript should be obtained *in forma pauperis*, under the doctrine of completeness, or pursuant to the inherent authority of the Court. At oral argument, the Federal Circuit agreed. However, the Federal Circuit never obtained the transcript, which had mysteriously disappeared from the lower court's file. *See* Appendix I; Appendix J. Thus, not only were Petitioners denied access to the transcript in preparing their appeal, but the Federal Circuit affirmed the trial judge's sanctions without reviewing for itself the conduct at issue on appeal. Moreover, in rendering its decision, the Federal Circuit not only failed to obtain and review the complete transcript, but it also declined a belated offer by Respondent (made only at oral argument) to provide seventy-five percent (75%) of the transcript (*see* Appendix D at App. 47), and an offer by Petitioners to pay for the remainder.

ARGUMENT

A. The Issue of Extra-Judicial Bias and Prejudice is Properly on Appeal.

Importantly, the issue of extra-judicial bias and prejudice was presented to the trial judge -- albeit diplomatically to try to avoid inflaming him -- in Petitioners' motion for recusal.[1] *See* Appendix G. Among other evidence of extra-judicial bias and prejudice, in this oral motion Petitioners cited the trial judge's apparent "pre-judgment," repeated, negative comments about Mr. Frank Su's honesty, demeaning references to "Mr. Carter and his ilk," a *non-sequitur* about persons of all nationalities being treated equally after Petitioners questioned why Mr. Su was ordered back to the witness stand when Respondent's witnesses were never subject to such Orders, and general abusiveness towards Petitioners' clients and their witnesses, contrasted with comments about the extreme helpfulness of Respondent's witnesses. Moreover, the trial judge's ruling on this motion demonstrates that the issue of bias and prejudice was directly before him: "Now what counsel is really about here is alleging that over and above a [recusal] as indicated in section 455(a) or (b) as the case may be, that the court has engaged in misconduct. That is what your saying." *See* Opp. at A.7. The trial judge then cited a passage from *Pau v. Yosemite Park and Curry* Co., 928 F.2d 880 (9th Cir. 1991), in which the plaintiffs, who were from Hong Kong, made allegations of bias against a trial judge. Obviously, as the trial judge addressed these issues in his oral response to Petitioners' motion, they were clearly before him.[2]

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[1] Contrary to Respondent's representations, the failure to make a recusal motion in a district court "does not preclude raising on appeal the issue of recusal under § 455." *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 884-85 (9th Cir. 1991), *citing*, *Noli v. Commissioner*, 860 F.2d 1521, 1527 (9th Cir. 1988). Rather, it only increases the burden in demonstrating that the district judge erred in not recusing himself. *Id.*

[2] In its brief, Respondent tacitly admits that the trial judge referred to Petitioner Klayman as "Mr. Schmuckler." *See* Opp. at 11, n. 3; *see also* Appendix E at App. 55. Even if such a Mr. Schmuckler exists, it is improper for Petitioner Klayman to be berated in this fashion, as well as for another member of the bar, Mr.

Nonetheless, the issue on appeal was not only whether the trial judge should have recused himself, but whether there was, at a minimum, a showing of the appearance of extra-judicial bias and prejudice so as to call into question the propriety of the sanctions entered against Petitioners.

B. Petitioners Were Denied Due Process By the Trial Judge.

Due process requires that an attorney under threat of sanctions be provided particularized notice of the factual and legal bases for the sanctions to be imposed, and a meaningful opportunity to be heard. *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995) ("*FE & B*"). This requirement is especially important because an attorney's reputation is often at stake:

> Sanctions are not to be assessed without full and fair consideration by the court. They often entail a fine which may have more than a token effect upon an attorney's resources. More importantly, they act as a symbolic statement about the quality and integrity of an attorney's work -- a statement which may have tangible effect upon the attorney's career.

FE & B., 57 F.3d at 1227, *quoting*, *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994). Indeed, due process safeguards were particularly important with regard to the trial judge's *pro hac vice* Order, which was admittedly intended to bar Petitioner Klayman from ever practicing before the Central District again:

> I want that judge who gets the next case coming here to know about you. That judge is going to know that I precluded you...to ever practice in front of this court again.

Schmuckler, to be so demeaned. Obviously, "Schmuckler" is a Jewish name of Yiddish origin, and its use out of context obviously has a pejorative, anti-Semitic connotation. Regrettably, this is but one example of the trial judge's general misconduct, which violated the Code of Judicial Conduct for United States Judges. *See Code of Conduct for United States Judges*, Canon 3(A) (1992).

Opp. at A.19.

If the record reflects that the judge imposing the sanction has been the target of the sanctioned attorney's vilification, or was otherwise personally embroiled with the attorney during the trial, a court must carefully assess whether additional due process safeguards are required. *In re Yagman*, 796 F.2d 1165, 1181 (9th Cir. 1986). Moreover, the presiding judge must be sensitive to possible conflicts of interest if events cast him into the roles of witness, prosecutor and judge. *In re Evans*, 524 F.2d 1004, 1008 (5th Cir. 1975).

In this case, it is readily apparent that the trial judge failed to provide notice of the factual and legal bases for the sanctions imposed on Petitioners. It is also clear that the trial judge never gave Petitioners any warning that he was even considering *pro hac vice* sanctions. Indeed, the trial judge even stated at one point that he was not inclined to award sanctions. *See* Appendix H at App. 11. Nonetheless, the trial judge "sprung" upon Petitioners the *pro hac vice* Order, effectively barring Petitioner Klayman from practicing before the Central District.

In addition, in issuing this *sua sponte*, *pro hac vice* Order on July 24, 1992, the trial judge made clear that he had already determined to sanction Petitioners: "I will issue an order which will set forth your transgressions if you do not convince me to the contrary..." *See* Opp. at A.19-21. The only hearing -- if it can be called that -- provided to Petitioners was the chance to deliver an "off the cuff" rebuttal, without any meaningful opportunity to reflect on the charges against them, much less retain counsel, gather evidence and present their defense to a neutral fact finder. Even then, Petitioners' abbreviated response made clear that they had a meritorious defense, and that, had they been given the opportunity to reflect upon the charges against them, retain counsel, gather evidence and present their defense to a neutral fact finder, the result may well have been different. This never occurred, however, and on July 30, 1992, only six (6) days later, the trial judge predictably issued his written Order.

Dropping this "bombshell" at the end of trial, without any advanced notice to Petitioners, or even any specificity as to the legal basis for the sanctions, hardly satisfies due process. Moreover, the ability to file a motion for reconsideration cannot, as Respondent contends, rectify this lack of due process -- especially where, as here, the trial judge had decided to sanction Petitioners even before he had heard their abbreviated response.

Even the limited portion of the trial transcript that is available demonstrates that the trial judge had become so personally embroiled with Petitioners during course of this heated, seven (7) week trial, that additional procedural safeguards were necessary to secure Petitioners' due process rights. Instead, the same trial judge who had mockingly referred to Petitioner Klayman as "Mr. Schmuckler" (and similarly mocked Mr. Goldstein by repeatedly emphasizing the last syllable of his name, *see* Appendix F at App. 59) and whose recusal Petitioners had sought on the basis of extra-judicial bias and prejudice, acted as witness, prosecutor and jury. In their defense, Petitioner Klayman stated:

> ...I ask you to step back, to think about this because what you have just ordered I do not feel is correct or just. I think we have been though a very heated proceeding, Your Honor. I think there is a lot of emotion here and I think this has to be brought out and I had hoped to be able to make this presentation before Your Honor made those finding[s] today.

Appendix H at App. 11 (Emphasis added).

Respondent's reliance on *FE & B* is misplaced. In that case, the sanctioned attorneys had more than eleven (11) weeks notice of the pendency of a motion for sanctions, as well as awareness that they had been accused of acting in bad faith. *FE & B*, 57 F.3d at 1225. In that case, the Third Circuit made clear that it was not disturbing authority requiring advanced notice of the specific charges and a meaningful opportunity to be heard:

> We do not intend to disturb the line of case law cited by [appellant] in its brief. Rather, our holding is a narrow one,

> compelled by our finding that FE & B was provided with sufficient, advanced notice of exactly which conduct was alleged to be sanctionable and, furthermore, that FE & B was aware that it stood accused of having acted in bad faith...We do not expect, however, that the result reached here will be often justified in future cases where the sanctioned party was not explicitly informed beforehand of the precise ground for the imposition of sanctions.

FE & B, 57 F.3d at 1225-27, *citing*, *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357-58 (3d Cir. 1990).

C. Petitioners Were Denied Due Process on Appeal.

Likewise, Petitioners were denied due process on appeal. In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court recognized the important, due process right to have an appeal adjudicated on a full trial record. A review of the trial transcript was particularly important in this case where: (1) affidavits demonstrated multiple examples of extra-judicial bias and prejudice (*see* Affidavit of Richard Carter at Appendix E; Affidavit of Steven Goldstein at Appendix F); (2) Respondents' tacit acknowledgment of at least one such incident in which the trial judge likened Petitioner Klayman to a "Mr. Schmuckler" (*see* Opp. at 11, n. 3); and (3) the trial judge's history of making biased and/or otherwise improper remarks. *See Borrero-Isaza*, 887 F.2d at 1354; *see also Hobbs*, 991 F.2d at 571, 574.

At oral argument, the Federal Circuit acknowledged the importance of reviewing the complete trial transcript in adjudicating the parties' appeals. *See* Appendix D at App. 47-49. It not only failed to do so, but it also declined an offer by Respondent to provide seventy-five percent (75%) of the transcript (*see* Appendix D at App. 47), and an offer by Petitioners to pay for the remainder. Petitioners were not even able to review the trial transcript in the lower court's file, because it had mysteriously disappeared. *See* Appendix I. Surely, meaningful appellate review -- not only for purposes of Petitioners's appeal, but for Respondent's cross-appeal as well -- required that the Federal Circuit review the entire

transcript, or as much of it as possible, in order to rule on the important issues before it. *See* Appendix J. Because it failed to do so, Petitioners were denied due process in this regard as well. *Griffin, supra.*

D. This Court Must Resolve Conflicts Among the Circuits on Important Issues in the Law of Sanctions.

The U.S. Courts of Appeal for the Second and Third Circuits have held that a finding of bad faith is necessary before sanctions may be awarded pursuant to 28 U.S.C. § 1927. *See U.S. v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345-47 (2d Cir. 1991); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987). However, the U.S. Court of Appeals for the Ninth Circuit, and now the Federal Circuit, have held that a finding of recklessness will suffice for such an award. *Optyl Eyewear Fashion Int'l Corp. v. Sytle Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985); Appendix A at App. 20 (Emphasis added). Thus, there is a readily apparent conflict among the Circuits as to the standard for imposing sanctions under 28 U.S.C. § 1927 that must, respectfully, be resolved.[3]

As a result of the Federal Circuit's decision, there is also a readily apparent conflict among the Circuits as to whether an express finding of bad faith is necessary for a court to enter sanctions pursuant to its inherent authority. In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991), this Court held that, because of their "very potency," inherent powers should be exercised "with restraint and discretion." Thus, several of the Circuits require a highly particularized, express showing of bad faith before imposing sanctions pursuant to a court's inherent powers. *See Zambrano v.*

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[3] Respondent's represent that there is no such conflict based upon a Ninth Circuit case holding that, under 28 U.S.C. § 1927, a finding of bad faith or recklessness may be inferred from a review of the complete record. *MGIC Indemnity Corp. v. McKenna, Conner & Cuneo*, 952 F.2d 1120, 1122 (9th Cir. 1991). Obviously, whether a finding can be inferred from the complete record has no bearing on whether that finding must be "bad faith," or whether "recklessness" will suffice. In any event, the holding of *MGIC* is irrelevant to this case, because the Federal Circuit never had access to a complete record (*i.e.*, the trial transcript) from which it could make either finding.

City of Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989); *Int'l Bhd of Teamsters*, 948 F.2d at 1345-47. Here, the Federal Circuit not only speculated that the trial judge had relied on the Court's inherent power in entering the *pro hac vice* Order, but it also affirmed the Order by inferring a finding of bad faith.[4] *See* Appendix A at App. 22. Thus, this case creates a precedent that directly conflicts with Circuits that require a highly particularized, express finding of bad faith, as well as this Court's holding in *Chambers*. Respondent's reliance on *FE & B* is again misplaced, because that decision was limited to its facts by the Third Circuit itself. *FE & B*, 57 F.3d 1225-27.

CONCLUSION

This case is of landmark importance not only because it raises important questions about judicial impartiality and the natural hesitancy of appellate courts to review judicial misconduct, but because of its serious implications for the bar, and for our legal system as a whole. While safeguarding due process is obviously important in all cases, it is especially important in the context of attorney conduct because of the effect that wrongfully imposed sanctions may have on counsel's zealous representation of clients. Imposing sanctions without adequate notice of their purported factual and legal basis, a meaningful opportunity to be heard, including, where appropriate, the right to counsel, and a neutral finder of fact, will undoubtably have a chilling effect on a lawyer's willingness to represent his or her clients to the fullest extent of the law. For this same reason, it is also of crucial importance that sanctions orders be carefully scrutinized on appeal. Because our legal system depends on a lawyer's willingness to represent his or her clients to the fullest extent, and because that willingness is threatened by wrongfully imposed and summarily affirmed sanctions such as these, the Court must, respectfully, grant *certiorari* to address the important issues raised by this unique case.

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[4] The holding of *MGIC* is irrelevant because that decision only involved sanctions awarded under 28 U.S.C. § 1927, not a court's inherent powers.

Respectfully submitted,

Larry Klayman, Esq.
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Counsel for Petitioners

APPENDIX G - EXCERPT FROM MAY, 1992 TRIAL TRANSCRIPT CONTAINING ORAL MOTION FOR RECUSAL

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4914 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP, *et al.*,

Defendants.

pp. 1171-77

MR. KLAYMAN: Your Honor, I'd like to make a general motion.

THE COURT: What's that? What's a general motion?

MR. KLAYMAN: May I ask for a recess to make a general motion?

THE COURT: No. You want to make a motion, you can make -- I don't know what you mean by a general motion. I've never heard of a general motion.

MR. KLAYMAN: I have a motion that I wanted to make at the closing of the plaintiff's case, but I feel that it may be more appropriate at this time.

THE COURT: What's the general motion?

MR. KLAYMAN: Should I take the lectern?

THE COURT: You can stand there, sit there, or take the lectern, whatever you want to do.

MR. KLAYMAN: Your Honor, it's only after great consideration that I make this motion. I've given it great thought; I've thought about it and I have -- it's not the kind of thing that makes me happy, and I say it in a grave voice. I am convinced that I have to make the motion because I am counsel. I've taken an oath to protect my client zealously within the bounds of the law. And the motion is, your Honor, that I ask you to recuse yourself in this case. I know that we're all human. I'm human too. And I feel that sometimes you can prejudge an issue. And I have sat here throughout this case and have listened to certain things occur. And I would not be doing my job as counsel if I did not make the motion, and the motion is made under 28 U.S.C. 455(a).

THE COURT: I'm familiar with 28 U.S.C. 455(a).

MR. KLAYMAN: And allow me to enumerate some of the bases for that, your Honor, I believe, and I've made a record and I don't want to belabor the point here, because my intention is not to be abrasive; my intention is not to do anything other than my job. But I sat here and I've listened to comments that have reflected that my client is not telling the truth, that you referred to -- and when I questioned that, your Honor, that statement, your Honor disagreed with it and pointed out that this was not true. I got a very strong reaction.

You've referred to Richard Carter, one of my clients, as a Richard Carter and his ilk. In addition to questioning my client's honesty, you have ordered him back to the witness stand, and I felt it was ordered in a very strong and negative way, and I questioned that, and pointed out that you didn't do that with Mr. Sturrus. And you raised the issue that you treat everybody the same regardless of national origin. Your Honor, that was a non-sequitur in that context.

You've made comments that, Mr. Klayman, to the effect that you'd better watch yourself here, because I'm going to be trying the libel suit. The libel suit doesn't have anything to do with this case.

You've made comments about the plaintiff's witnesses before I had the opportunity to cross-examine those witnesses in terms of their extreme helpfulness towards the case; and it was at that point that, in my view, sitting here, made you explode. I'm not concerned with your approach towards me. I am concerned about it towards the client, however.

You early on during this proceeding questioned and suggested that Mr. Su is not telling the truth when he had a hernia operation and could not be here. We submitted medical evidence and letters from Mr. Su stating that, in fact, he did need that operation and, in fact, we also submitted letters and documentation showing that he wanted to go to trial. I released some attorney-client information that he'd sent to me saying he was anxious to go to trial, yet you questioned whether he wanted to be in trial and you made remarks in this case about him not showing up the first time, and that's why you ordered him back to the stand.

You have threatened me with contempt and sanctions. I think the record is clear that I am trying to do my job, your Honor. I have not been in any way negative towards either you or opposing counsel.

You have cut me off virtually at every opportunity to give an objection and to explain it and I've started to ask if I could have permission to explain, because I want to have an orderly proceeding, and you cut me off from that, too.

You made comments about a problem I had reading an exhibit, suggesting that the fact that I couldn't read exhibits on two pieces of door hardware suggested confusion in the case.

THE COURT: The confusion that was replicated with Mr. Su on the stand today when he said he identified the product -- I have a note on that. Yes, I did make that observation.

(Brief pause)

Exhibit 16. The witness stated that the product was his, unequivocally. Mr. Neuner, quite frankly, asked another question and

got an answer, "well, I don't know." When he had an answer: "it is my product." So then, to reinforce it, "That's your product?"

"Oh, well, I'm looking at it closely now; no, I don't think it's my product."

That's exactly what happened here. Okay?

MR. KLAYMAN: Your Honor --

THE COURT: And I want to say that you must, of course, make your record, Mr. Klayman. But I can't help but observe that the mistake that he made today was a mistake that you made earlier in this proceeding.

Please continue with your observations and/or objections.

MR. KLAYMAN: Your Honor, there is no record that anything other than the fact that this man has been under a lot of pressure -- he's been testifying for a long time. I did not take the advantage that you took of him. But this is another indication that you have prejudged the case.

And your Honor, I sat here for two days, and whatever the case may be in terms of how you perceive our client and myself, we took a tremendous amount of what I perceive to be abuse -- layered on top of the fact that admittedly at some point in this case you had a prospective interest, potential interest in Masco.

I have to say, your Honor, that the standard here is whether -- and there's a case, Fawn versus American Air Lines, 431 1334, Northern District of California, 1977.

THE COURT: What judge is it?

MR. KLAYMAN: I don't have the name of the judge, your Honor. It's one of a number of similar cases, wherein it states: The charge of lack of impartiality must be grounded on facts which would create a reasonable doubt concerning the judge's impartiality. Not in the mind

of the judge or even necessarily in the mind of the litigant, but rather in the mind of a reasonable person.

And sometimes, your Honor, when you yourself are involved -- I mean you plural, not you, your Honor -- it's hard to see what may be occurring. The standard here is the reasonable person, your Honor. And I submit, and submit strongly, and I'm not in any way happy about this. I think if anybody sees my demeanor here, I'm shaking a little bit because I've never done this before. But I firmly believe, and I'm sure that the record will reflect that this is that case where indeed prejudgment has occurred, and I ask you, your Honor, as a man of integrity, to recuse yourself of this case.

THE COURT: Your motion has been made, Mr. Klayman...

APPENDIX H - EXCERPT FROM JUNE 24, 1992 TRIAL TRANSCRIPT CONTAINING LARRY KLAYMAN'S ORAL RESPONSE TO JUDGE KELLER'S *SUA SPONTE*, *PRO HAC VICE* SANCTIONS

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4914 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP, *et al.*,

Defendants.

pp. 116-129

THE COURT: ...Do you want to be heard?

MR. KLAYMAN: Yes, I do, Your Honor. Let me just say at the outset, I think that my demeanor in the record will show that I have always been respectful towards the court, towards you, towards Mr. Neuner and towards everybody on the other side. With regard to the other side, with regard to the plaintiff, Your Honor, I have gone through seven weeks of trial being accused of everything. It got to the point where I was even accused of suborning perjury. And at that point, Your Honor prevented me from consulting with my client. There was in effect a, quote, gag order, during a time when he was being accused of perjury. Plaintiff's counsel obviously was not only aggressive. Your Honor, this is not only offensive, but it severely jeopardized the rights of my clients and I came before this court to protect the rights of my clients. And I have always been the kind of a lawyer that has gone maximum for my clients within the bounds of the

law, and ethics. And for that reason, I don't regret my defending them the way I did in this case.

Your Honor, I believe that a lot of the vituperative and offensive accusations which were on a virtual continual basis were the result of wanting to retaliate for my having filed on behalf of my clients a liable (sic) action which this court sustained in a motion to dismiss. And it is a valid action, Your Honor. You are dealing here with a situation where you do have and forgive me for raising it again, a disparity between wealth, and we heard here today even plaintiff's counsel tried to raise the national issue, the fact that his client is American and mine is Taiwanese. Well, that doesn't make us any less virtuous.

THE COURT: I have made that very clear to you, Mr. Klayman, again and again, that everybody stands equal before this court. From time to time we have talked about forensics of presenting a case with these facts to a jury. That has no bearing on how you are addressed by the court nor by a jury because I have instructed them fairly well in this regard.

MR. KLAYMAN: Well, Your Honor I am an American and I am proud of it too. I am third generation American. My grandparents were Jewish from Russia and I knew them very well and I was very close to them and I felt close to people from overseas as well as I feel very proud of being an American and I do find that offensive. And I have always worked hard on all of my clients' behalf, whether they are rich or poor, and in this particular case, Your Honor, which is not the happiest moment of my life, today, and for the record, I defended my clients for 75 dollars an hour, two-thirds of the legal fees are outstanding. I doubt that I will be paid. I did it because I thought I was right in defending them. I have been here for seven weeks. My law firm is on the verge of financial ruin because to have two attorneys here that aren't getting paid out of three that currently exist, takes a big chunk out of legal fees, billings and cash flow and I am involved in other big cases. Your Honor, I am paying the price and I felt that I did what I thought was right.

And that also goes with regard to the motion I made for recusal. That was not meant personally towards you, or to the court. But

sometimes, Your Honor, we are all human, sometimes Your Honor, we do not always see things that other people can see from a distance. The older I get, and I am not that old, I am 41 next month, the more I realize little I know (sic). And in fact when you see the brief you will see I said just the same thing, Your Honor. I don't say that we didn't have some inadvertent errors here. They were inadvertent.

And I guess trying a lawsuit on less than full resources, less than a million to two million dollars which is what they spent, I think a million is conservative, I think they spent more, it is hard to do. But how do you deny people the right to counsel simply because they don't have the money like Baldwin, and maybe I am a soft touch, but it is hard with three lawyers.

THE COURT: Excuse me. You are not speaking to the issue that I raised namely --

MR. KLAYMAN: I am getting to the issue.

THE COURT: Namely my perception of various transgressions.

MR. KLAYMAN: I wanted to raise this because I do believe that when I did raise the recusal issue, Your Honor, I believe that subconsciously in your mind you transferred the wrath that I was perceiving on behalf of my client to me. And that that has affected the conduct of this trial and that is what I was saying about all of us being human. We are not all perfect. But I want to speak my mind and that is the way I am in other aspects of my life and that is the way I am here. It doesn't mean I don't respect this court. It means I am trying to do my job. And I will take the punishment that you have meted out and I will move on. And I will continue to do what I think is right.

Now, let me address your specific questions, specific issues. With regard to multiple objections without arguable basis, Your Honor, I do not believe sincerely that I made speaking objections and if there is one or two on the record it was inadvertent. I did not, I made a special point of not trying to interfere with testimony but I do have right to protect my client and he has a right too and I have to make objections where I think they are incorrect.

And we had a situation here where Mr. Neuner was very very aggressive towards our client, I am using that word very diplomatically, and I have to protect that client. That is what I am paid to do and that is what I feel morally I have to do.

Your Honor, in terms of your asking me to be quiet, it was never my intent to interrupt you or anyone else here. Since I do feel strongly about this case I guess a certain anxiousness in my perceiving certain things happening caused me to comment, but I think the record is clear and I think Your Honor knows that I never did it in a bellicose way and I never did it intentionally. And I never did it to disrupt. To the extent that I am human, I apologize for that. But to the extent that I am trying to be here as counsel to protect my client I cannot apologize.

With regard to the issue of 282, jury demands and requests for admissions, Your Honor, 282, that was an oversight by an attorney in our office and I accept responsibility. I am the head of that office. That is my office. It was inadvertent and there was no prejudice to the plaintiff.

And to the contrary, Your Honor, I think our legitimate concern about the failure to respond to request 57 and other requests is much much much more serious to this day. You have here a company that knows exactly what is out there. In fact patterned their products after what is out there. Admissions to that effect. It didn't produce one catalog, much less the products that they borrowed the designs from themselves.

I think equity is in order here, fairness, equality. And to the extent that I felt strongly about it, I didn't see that fairness come in.

With regard to request for admissions, I don't recollect that issue. I think there was a pleading that was filed late, a day late in this case and Your Honor sanctioned us over a thousand dollars for that. We had to pay sanctions in this case already.

Not obeying orders of the Court, Your Honor, we tried to obey all of your orders and I will continue to do so in the future.

With regard to the issue of Frank Su being here, Your Honor, we were coming from Washington and we got called after close of business on Monday, I did interpret the 36 hours to mean that we wouldn't start later than Thursday and told the clerk that. I did state that I needed time to meet with the client and get there myself. We were coming with a lot of exhibits and documents and other matters. I interpreted 36 to mean Thursday.

In terms of not bringing a client in to trial the first day, Your Honor, I think probably in your own practice you may have faced that issue or taken that approach. I didn't want Baldwin to grab him and put him on the stand before I had an opportunity to talk to him. I don't have the proximity that Mr. Neuner has to Redding to Taiwan. I talked with him very little before this case.

With regard to the Eurotech patent, Your Honor, I have seen a letter in the file from Ms. Karen Snow which mentioned that there was a Eurotech patent and I didn't see the subsequent letter which said that she looked for it and couldn't find it. I asked one question about the Eurotech patent believing that there was one, just, it was on cross-examination, just to see how the witness would react.

Mr. Neuner made a big issue of it and asked me to produce the Eurotech patent. I then went back to the office and found we didn't have a Eurotech patent and didn't realize, Your Honor, and perhaps it wasn't, I didn't take the note that Your Honor wanted a response on that particular day. I was going to ask for additional time to look for it more, but in fact it was an honest mistake and it was just a cross-examination question.

Suppose I asked about anything to see if I could refresh the witness' recollection. Maybe I would have jogged the recollection of another patent. But I didn't say anything that I didn't believe to be true at the time and in fact I just simply withdrew the question. It was an instant. There are many examples of that in the course of the trial. Nobody is perfect.

With regard to Sepco, late discovered art, Your Honor, again, I am sitting here as defense counsel. Mr. Neuner makes a very strong

accusation that my client is not telling the truth, he is perjuring himself. Your Honor, for whatever reason, decided he was going to question Mr. Carter himself, and asked a number of leading questions. And it is evident that you were a trial lawyer and you know how to ask questions and you do so in a very trial lawyer like way, and you built him up to that point. You started by asking well, isn't this case important to you? Well, since it is important to you, wouldn't you remember the prior art? Well, if you remember the prior art, wouldn't you tell that to your counsel? And isn't it a fact that you told him about it here?

You know, each question was building to get to the conclusion, Your Honor, and I don't think that Mr. Carter, knowing Mr. Carter, he is not someone who has a lot of strength, for lack of a better word. He is the kind of person who somebody who is much more dominant than he is will react to that and you do have a position of authority here, Your Honor, and everybody respects that and consequently his testimony that you elicited as you perceived it, came out differently than when I elicited it. But in fact when you go back on it neither Ms. Snow nor I were at that fair that he says perhaps Sepco was at and he recognized that. That fair was after us, after we had gone to an earlier fair in Philadelphia. Sepco wasn't even displaying there and therefore it was an impossibility. And then Mr. Neuner comes along and he asks some questions about Sepco and Mr. Carter gives him the same dates that I got.

Your Honor, I ask this lawyer to lawyer, lawyer to judge, one human being to another, I ask you to step back, to think about this, because what you have just ordered I do not feel is correct or just. I don't think on reflection that you will think that way either. I think we have been through a very heated proceeding, Your Honor. I think there is a lot of emotion here and I think this has to be thought out and I had hoped to be able to make this presentation before Your Honor made those findings today. I did understand Mr. Neuner's motion to have me sanctioned under 1927, I did understand you to say you were disinclined to grant it.

I thought I would have the opportunity to speak and say these things before. Because I believe that you will understand when you have a

chance to step back, just like I have tried to step back. It was not my desire to put myself into conflict with anyone here. But I had a client to represent.

So consequently, I ask for you to reconsider it, Your Honor, and I also ask for you to reconsider the nature of the relief that you are providing. Not only will it irreparably harm me to issue that order, not just on 1927, but with regard to *pro hac vice*, before there is any opportunity to ask for reconsideration or appeal, but it will also reparably (sic) harm my clients because I do have other clients pending before other judges and I think that you can understand that if another judge perceives that a lawyer is, as I have been accused, dishonest, disreputable, unprofessional, you name it, I have been accused of it, that when I walk into the court with that client, that not only am I at a severe disadvantage if not severely prejudiced, but the client is as well.

In fact I remember going to a seminar, I think given by a lawyer who was explaining the technique of F. D. Bailey (sic), I think maybe it was Professor Irving Younger. He said, Professor Irving Younger when he talks about his client always says "we" to the jury. He wants the jury to identify with him as well as his client.

Your Honor, the client and the lawyer is in many respects inseparable. The jury will perceive lawyer. The judge will perceive that lawyer sometimes through how he perceives the client. That may be what happened here or maybe even vice versa.

Consequently by issuing that order, Your Honor, and sending that to every judge, this will irreparably harm my reputation and irreparably harm my clients and could very well affect their interests.

Your Honor, if I have offended you in some way, that was not my intent. I have tried to be professional. I have tried to do my job. I have done it at great expense to myself, financially, emotionally and otherwise. I have worked 16, 18 hours a day for the last seven weeks. I have not been able to tend to other cases during that period.

Your Honor, we have paid the price, whatever that price may be and, Your Honor, I feel that I was trying to do my job as a lawyer. That is the effect of it.

THE COURT: All right. We have motions to get in, is that right?

APPENDIX I - JULY 6, 1995 LETTER FROM THE CLERK OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT TO THE CLERK OF THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

717 MADISON PLACE. N.W.
WASHINGTON, D.C. 20439

July 6, 1995

FRANCIS X. GINDHART
CLERK

TELEPHONE: 633-6550
AREA CODE: 202

VIA FAX AND FIRST CLASS MAIL

Mr. Frank E. Goodroe
Clerk
U.S. District Court
U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

Re: DCt. #90-4919, J. Keller
CAFC #93-1185
Baldwin Hardware v Franksu Enterprise

Dear Mr. Goodroe:

This is a request for your assistance in obtaining the complete trial transcript in the above appeal.

On September 21, 1994, our request was faxed to Valerie Feleh in your office. However, the only parts of the record you forwarded were: (1) 2/25/91 Initial Conference; (2) 12/16/91 Pretrial Conference; (3) 1/3/92 Telephonic Conference concerning illness of Defendant

Frank Su; (4) Amended version of (3) above; and, (5) 3/1/93 Post-trial Hearing on Civil Contempt/Violation of Injunction.

The judges on the panel have been more than patient awaiting the complete transcript. Although recognizing that the transcript involves a 7-week trial beginning on or about 5/7/92, and is apparently several thousand pages in length, the delay of now over 8 months in providing the transcript is questioned by the court.

Mr. VanVeen of my office has been diligently pursuing the request and has spoken with Valerie Fejleh, Bonita, Dawn Bullock, Derrick Martin, the court reporter, and lastly, Tyrone Lawson.

I would appreciate your looking into this matter as the court needs the trial transcript immediately.

Very truly yours,

/s/
Francis X. Gindhart
Clerk

df
cc: Judge Keller

APPENDIX J - APRIL 14, 1994 LETTER FROM THE ANTI-DEFAMATION LEAGUE TO LARRY KLAYMAN*

ADL

Anti-Defamation League

April 14, 1994

Larry Klayman, Esq.
Klayman & Associates, P.C.
501 School Street, S.W.
Suite 700
Washington, DC 20024

re: Baldwin Hardware Corp. v. Frank Su et al.,
Appeals Nos. 93-1185, 93-1186

Dear Mr. Klayman:

This letter responds to your correspondence and to your allegation that Judge William D. Keller made anti-Semitic remarks from the bench during the trial of the above-referenced case.

We take your allegations seriously, but cannot evaluate it fully based on the material you have provided to date. Consequently, we believe it would be in the best interest of all concerned, including the Judge, if the transcript of this trial were made available so that this allegation can be either supported or refuted, both generally and in the context of your appeal.

* This letter was made part of the record before the Federal Circuit as an exhibit to Petitioners' August 15, 1994 Renewed Motion for Access to the Trial Transcript and to Supplement the Record to the Merit's Panel.

For this reason, we support your effort to obtain the trial transcript.

Sincerely,

/s/
Abraham H. Foxman
National Director